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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Queen's Bench,

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

EASTER AND TRINITY TERMS,

IN THE

SECOND YEAR OF VICTORIA.



BY

THOMAS ERSKINE PERRY, ESQ.

AND

HENRY DAVISON, ESQ.

OF THE INNER TEMPLE, BARRISTERS AT LAW.



VOL. II.



WITH

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OF THE
C O U R T O F Q U E E N ' S B E N C H ,
During the period comprised in this volume.



The Right Hon. THOMAS Lord DENMAN, C.J.

The Hon. Sir JOSEPH LITTLEDALE, Knt.

The Hon. Sir JOHN PATTESON, Knt.

The Hon. Sir JOHN WILLIAMS, Knt.

The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.



ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

A

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ERRATA.

In *Doe d. Mayhew v. Asby*, 3d line, in the judgment of Lord Denman C.J., for “*would*” read “*could not*.”

In *Mattock v. Kinglake*, 344, 4th line from the end of argument in support of the demurrer, for “*and independent acts*” read “*but, &c.*”

In *Doe v. Evans*, 378, near the end of the marginal note, dele “*,* having once been revoked,”.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

IN

EASTER TERM,

IN

THE SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,
Lord DENMAN C. J. PATTESON J.
LITTLEDALE J. COLERIDGE J.

In the Bail Court,
WILLIAMS J.

1839.

*April 23d,
24th & 25th.*

STOCKDALE *v.* HANSARD and others.

CASE. The declaration (May 30th, 1837) stated that, before and at &c., the plaintiff was a bookseller and publisher of books, and as such had published divers scientific books, and particularly in the year 1827, a certain physiological and anatomical book, written by a learned physician, on the generative system, illustrated by anatomical plates; and whereas the defendants, on the 1st May, 1836, did publish and cause to be published, in a certain book, purporting to be a Report of the Inspectors of the Prisons of Great Britain, and averred that a report, containing the alleged libel, had been ordered by the House to be printed and published, and that the defendants, in pursuance of the order, published the report in question; and further alleged a resolution of the House of Commons, that the power of publishing such of its reports, votes and proceedings, as it should deem conducive to the public interests, was an essential incident to the functions of Parliament, more especially to the Commons' House of Parliament as the representative portion of it; the Court held, on demurrer, 1st. That it was competent to inquire whether the alleged privilege existed or not; 2dly. That no such privilege existed.

Where a plea to a declaration in libel, justified under an order of the House of Commons, for the publication of parliamentary papers and reports, and an appointment of the defendants as printers and

1839.

STOCKDALE

v.

HANSARD
and others.

Pleadings.

Declaration,
13th May,
1837.

tain, the following passage, that is to say, "This last is a book" (meaning the said physiological and anatomical book) "of a most disgusting nature, and the plates are indecent and obscene in the extreme," whereas in truth the said book is purely of a scientific character; yet the defendants well knowing &c., but contriving &c., on the 19th August, 1836, maliciously &c. did publish of and concerning the plaintiff, in his said trade, in a certain printed paper, purporting to be a copy of the reply of the inspectors of prisons for the home district, with regard to the report of the court of aldermen, to whom it was referred to consider the first report of the inspectors of prisons, so far as relates to the gaol of Newgate, which said copy of the reply purports to be a letter from *William Crawford* and *Whitworth Russell*, Esquires, inspectors of prisons for the home district, to the Right Honourable Lord *John Russell*, &c. &c. &c., the false, scandalous, and defamatory libel following; that is to say, "But we deny that that book is a scientific work (using that term in its ordinary acceptation), or that the plates are purely anatomical, calculated only to attract the attention of persons connected with surgical science; and we adhere to the terms which we have already employed, as those only by which to characterize such a book," meaning thereby that the said book was disgusting and obscene, as stated in the above-mentioned report of the inspectors of prisons of Great Britain; and in another part of the said libel to the substance and effect following; that is to say, "We also applied to several medical booksellers, who all gave it the same character; they described it as one of *Stockdale's* obscene books (meaning thereby that the plaintiff was a common publisher of obscene books), that it never was considered as a scientific work, that it never was written for or bought by the members of the medical profession as such, that it was intended to take young men in, by inducing them to give an exorbitant price for an indecent work," to the great injury of the plaintiff in his said trade, and to his damage of 5000*l.*

Plea (a) (of 6th July, 1837) stated, that before the commencement of the suit the 5 & 6 *Will.* 4, c. 38(b) had been passed, and the appointment under it of *William Crawford, Esq.* and the Rev. *Whitworth Russell*, as inspectors of prisons in Great Britain, and the defendants say, that afterwards, to wit, on 1st March, 1836, the said *W. Crawford* and *W. Russell*, as such inspectors as aforesaid, made their report in writing of the state of a gaol called Newgate, and transmitted the same to the Right Honourable Lord *John Russell*, then being secretary of state, in pursuance of the said act of parliament; and the defendants say, that heretofore and before the publication of the supposed libel in the declaration, to wit, on the 13th August, 1835, a parliament of our sovereign lord his late majesty King *William 4*, was holden at Westminster, and it was in and by the Commons' House of the said Parliament then resolved and ordered that the parliamentary papers and reports, printed for the use of the House should be rendered accessible to the public by purchase, at the lowest price at which they could be furnished, and that a sufficient number of extra copies should be printed for that purpose. And the defendants further say that, afterwards at a parliament of our said lord the late king, holden &c., in the year 1836, and before the publication of the said supposed libel in the said declaration, to wit, on the 9th February, 1836, it was ordered, by the said Commons' House of Parliament, that a select committee should be appointed to assist Mr. Speaker in all matters which related to the printing executed by order of the House; and the defendants say that afterwards and before the publication of the said supposed libel, and whilst

1839.

STOCKDALE

v.

HANSARD
and others.

Pleadings.

Plea,
6th July, 1837.

(a) On a petition by the defendants to the House of Commons, June 1st, 1837, for directions how to proceed in the present action, the House resolved that the defendants should be allowed to plead to the action, and they instructed the Attorney-General to

defend; see 38 Hans. Parl. Deb. 3d ser. 1149—1249.

(b) "An Act for effecting greater Uniformity of Practice in the Government of the several Prisons in England and Wales, and for appointing Inspectors of Prisons in Great Britain."

1839.

STOCKDALE
v.HANSARD
and others.

Pleadings.

Plea.

the said last-mentioned parliament was so sitting as aforesaid, to wit, on the 18th March, in the year last aforesaid, it was resolved by the said committee of the said House (amongst other things), that the parliamentary papers and reports, printed by order of the House, should be sold to the public, at certain specified rates, and that the Messrs. *Hansard* (meaning the defendants), the printers of the House, be appointed to conduct the sale thereof. And the defendants say that, afterwards and before the said publication of the said supposed libel, and whilst the said parliament was sitting, to wit, the 18th March, in year last aforesaid, a copy of the said report of the said *W. Crawford* and *W. Russell*, so being inspectors of prisons, was laid before the said Commons' House of Parliament, pursuant to the directions of the said act, and afterwards and before the publication &c., and whilst parliament was sitting, to wit, on the 22d March, in the year last aforesaid, it was resolved in and by the said Commons' House of Parliament that the said report should be printed, whereupon the said defendants then being the printers, appointed for that purpose by the said House, did, to wit, on &c., in pursuance of the said orders and resolutions, print and publish the said report. The plea then stated an order of the House of Commons of the 5th July, 1836, that there should be laid before that House, and printed, a copy of a report made on the 2d July, 1836, by a committee of the court of aldermen to that court, upon the said report of the inspectors of prisons on the gaol of Newgate; that on the 22d July, 1836, *W. Crawford* and *W. Russell*, so being such inspectors as aforesaid, transmitted to Lord *John Russell*, as secretary of state, their reply to the report of the committee of the said court of aldermen; and afterwards and before the publication &c., a copy of the said reply was laid before the said House, and on the 26th July, 1836, was ordered to be printed; whereupon the defendants, so being printers as aforesaid, did, by the authority of the Commons' House of Parliament, and in pursuance of the said orders and resolutions, print the said reply of the said inspectors of prisons, as directed and required

by the said orders and resolutions of the said House, and did publish the same by the authority of the said House, and not otherwise, as it was lawful for them to do, for the cause aforesaid. And the defendants say, that the said report and the reply, which the defendants so printed and published, as in that plea mentioned, were the same report and reply as were mentioned in the declaration, and that the said matter in the said declaration charged as libellous was contained in the said report and reply in that plea mentioned &c. And the defendants further say that the said Commons' House of Parliament theretofore, to wit, on the 31st May, in the year last aforesaid, resolved, declared and adjudged, that the power of publishing such of its reports, votes and proceedings, as it should deem necessary or conducive to the public interests, was an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament, as the representative portion of it. Verification.

Special demurrer, setting out for causes, that the known and established laws of the land could not be superseded, suspended or altered, by any resolution or order of the House of Commons, and that the House of Commons or Parliament assembled could not, by any resolution or order of themselves, create any new privilege to themselves inconsistent with the known laws of the land, and that, if such power were assumed by them, there could be no reasonable security for the life, liberty, property or character, of the subjects of this realm.

Joinder in demurrer (a).

Curwood, (with whom was *Carrington*,) for the plaintiff. Three questions arise on the present record; first, whether a party has not a right in all cases to maintain an action for an injury sustained; second, if he has, whether any power but that of the legislature can restrain him in the exercise of that right; third, whether the House of Commons can maintain their resolution, that they are the sole judges of

1839.

STOCKDALE
v.HANSARD
and others.

Pleadings.

Plea.

Demurrer,
8th July, 1837.*Tuesday,*
April 23d.
Argument for
plaintiff.

(a) The demurrer was argued 25th, and in Trinity term, May in this term, April 23d, 24th and 28th, 1839.

1839.

STOCKDALE
v.HANSARD
and others.Argument for
plaintiff.Claim of the
H. of Com-
mons built on
the law of
Parliament.

their own privileges, and that a Court of Law may not take cognizance of them.

Their own report (*a*) must be looked at to ascertain the grounds on which they found their claims. They build it all on the law of parliament, and say, inasmuch as parliament is superior to all other Courts, no inferior Court can judge of their acts, and they rely on *Thorp's* case (*b*), where the judges, in answer to a question as to what was the law of parliament, said, "the law of parliament was above them, and they were not wont to give answer to the question, because that which was no law they might make law, and that which was law they might make no law." This is correct, when applied to the whole parliament, but not when applied to any branch of it. Anciently the two Houses sat together, and with the crown formed the Court of Parliament, and then undoubtedly had these powers, because any thing they then resolved to be the law became so. But now neither House of Parliament alone can make law. One House may declare such and such a privilege to be the law of parliament, the other House may deny it, and who is to decide between them? *The Queen v. Paty* (*c*) is a familiar instance, where this actually occurred.

The Commons
cannot make
law.

Supposing the House of Commons to have the right of declaring their privilege, can that right be questioned in a Court of Law? The Attorney-General may frame his argument on the resolutions of that House, but the same answer applies,—neither House has the power of making law. It is true several authorities are to be found where judges have used language disclaiming any jurisdiction, but others, most eminent authorities, are to be found, who have vindicated the majesty of the law. Most of the authorities in behalf of the power of Courts of Law, are collected in the pamphlet by Mr. *Pemberton* (*d*), and in the argument of

(*a*) Report of a Select Committee on Privilege, ordered to be printed May 8th, 1837.

(*b*) 5 Rot. Parl. 239; 1 Hattell, 28.

(*c*) 2 Lord Raym. 1105.

(*d*) "A Letter to Lord Langdale, on the recent Proceedings in the House of Commons on the subject of Privilege, by Thomas Pemberton, M. P., 1837." See also "A Letter to Thomas Pem-

Holroyd in *Burdett v. Abbot* (a). To cite, however, a few cases; in *Donne v. Walsh* (b), the House of Lords sent a writ of summons to the judges to surcease, but they held that, though the defendant was privileged in his person as the servant of a member of parliament, he was not privileged from action. In that case, therefore, cognizance of privilege was taken by the Court, and necessarily, because privilege by the law of parliament is as much a part of the law of the land as any other law, and the judges of the land are to pronounce upon it when it comes before them. So also in *Benyon v. Evelyn* (c), where the defendant pleaded the Statute of Limitations, and the plaintiff replied that the defendant was a member of parliament, and therefore he could not bring his action sooner, Sir *Orlando Bridgeman* overruled the plea, because he held that the defendant could have been sued, and therefore determined against the validity of the privilege, although it appears by the Commons' Journals, that long after that the House claimed the privilege of its members not being sued during the sitting of parliament. So in *Barnardiston v. Soame* (d), where the plaintiff, who had been elected a knight of the shire, brought his action for a false return at common law, and parliament claimed an exclusive right to decide on these matters, except so far as the statute *Jac. 1* had given a remedy at law; Lord *Hale* C. J. held that the Court of Queen's Bench had the power to decide the question.

The House of Commons Report collects the authorities making for them, and cites *Rex v. Wright* (e); and the dictum of Lord *Kenyon* C. J. who held that what was published by the House of Commons could never be considered a libel. But Lord *Ellenborough* C. J. in *Burdett v. Abbot* (a), called that an extravagant dictum, and said that he should

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berton, Esq., M.P., on the Privileges of the House of Commons, by Matthew Davenport Hill, Esq., 1838," and "Remarks on a Report from a Select Committee of the late House of Commons on the Publication of Printed Papers,

by P. A. Pickering, M.A., 1838."

(a) 14 East, 128.

(b) 1 Hatsell's Precedents, 41.

(c) Bridgem. 324.

(d) 2 Lev. 114; S. C. How. St. Tr. 1063.

(e) 8 T. R. 293.

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be ready to examine the pretensions of the House of Commons when they came judicially before him. The case of *Rex v. Sir William Williams* (a) is also one where the Courts of Law exercised jurisdiction; for an information having been filed by the Attorney-General against *Williams*, who, as Speaker of the House of Commons, had, by order of the House, published *Dangerfield's* narrative, the Court imposed upon him a fine of 10,000*l.* That case, however, is given up as worthless, it was decided in times of discord and confusion, and is entitled to no weight. The same treatment, however, is asked for *Thorp's* case (b), which was decided under similar circumstances. *Thorp* was Speaker of the Lancastrian parliament, which fined the Duke of York, who was then claimant for the Crown, 1000*l.*, and the answer of the judges was given in the midst of civil discord and faction.

The privilege
claimed, a
usurpation.

II. The House of Commons has no power to interfere with the plaintiff's right to bring his action. This question was discussed in *Ashby v. White* (c), when the House of Commons put forward their claim to have "the sole right of judging of elections;" but Lord *Holt* C. J., against three justices, held that the right of an elector to vote was annexed to his freehold, and that that was a question to be decided at law; and Lord *Holt's* judgment was confirmed on a writ of error in the House of Lords. The question therefore now is, whether the Commons possess the privilege of publishing what they please with impunity. They commenced this claim in the year 1641, that is, during the period of the Long Parliament; and if precedents of that time are to be relied upon, the beheading of *Charles* the First might be also brought forward as a legal authority. Many other claims have been set up by the Commons, some ridiculous, some tyrannical; and yet, if they are the sole judges of what is privilege, each of these is as well established as the most acknowledged law. In the Commons' Journals (Index) (d)

(a) 13 How. St. Tr. 1369.

(b) 5 Rot. Parl. 239.

(c) 2 Ld. Raym. 958; S. C. 14
How. St. Tr. 695.(d) *Carrington*, with the permission of the Court, read the extracts and authorities relied on in the argument.

it will be found that, from the Restoration to 1697, there are fifteen cases of breach of privilege for delivering ejectments on members. Five cases, during the same period, for serving process, sixteen for serving Chancery subpoenas, twenty-four breaches of privilege for entering upon the lands of members, one for entering upon mines, another for pulling down the scaffolding of Mr. *Bertie* the member for Oxford, thirteen cases for distraining their goods, three for impounding their cattle, another for lopping Mr. *Scaven*'s trees, forty-nine cases for arresting members' servants. From the year 1714 to 1774, there are fifty-one breaches of privilege for injuring members' property, amongst which one was for digging Lord *Gage*'s coal in 1728 (*a*), ploughing Mr. *Bowles*'s land (*b*), digging Sir *R. Grosvenor*'s land (*c*), killing Lord *Galway*'s rabbits (*d*), assaulting Sir *Watkyn Williams Wynn*'s porter in 1742 (*e*), fishing in Mr. *Jolliffe*'s pond in 1753 (*f*), entering Admiral *Griffin*'s fishery (*g*), digging in Earl *Verney*'s ground and carrying away a tree (*h*), Sir *R. Perrott* for entering the cellar of a tenement belonging to a member, was ordered into custody, 16th March, 1760-1 (*i*). In 13 Com. Journ. 313, an attorney of the name of *Rogers*, who had presented a bill of costs to the gunners of Portsmouth, which the House thought exorbitant, was committed for a breach of privilege; and in 1 Com. Journ. 352, there is a case of a man of the name of *Bigland*, who was committed for taking Mr. *James*' (a member) horse from the inn stable in London, and riding it post a journey.

How can it be contended that a body claiming privileges of this kind, can be exempt from the jurisdiction of Courts of Law? In *Long Wellesley*'s case (*k*), Lord *Brougham* C. held that the law should supersede the privilege claimed by a member, and therefore most properly took upon himself to determine how far privilege of Parliament extended.

(*a*) 21 Com. Journ. 116.

(*b*) *Ib.* 511.

(*c*) 22 Com. Journ. 102.

(*d*) 23 Com. Journ. 505.

(*e*) 24 Com. Journ. 391.

(*f*) 26 Com. Journ. 698.

(*g*) 28 Com. Journ. 489, 545.

(*h*) *Ib.* 915.

(*i*) *Ib.* 1107.

(*k*) 2 Russ. & Myl. 639. See 4 Lord Brougham's Speeches, 342.

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On these broad principles, which deny the right of the House of Commons to assume the whole legislative power, and to supersede the law at their pleasure, the case is rested. Many conflicting authorities will be cited, but of bad times, and therefore of no weight on a great constitutional question. Many illegal practices and doctrines hold their ground for a length of time, until on investigation they are found not to be supported. Torture was long used in this country, although many great authorities had declared it to be illegal; and it appears from "*Jardine on Torture*" that two of those authorities, Sir *E. Coke* and Sir *J. Smith* had signed a warrant themselves for putting parties to the torture. So it is anticipated in this case, that what was done before in earlier periods of the constitution, and in troubled times, will be found on investigation to be wholly illegal.

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24th & 25th.Statement of
the question.

Sir *J. Campbell* A. G., *contra*. In this case the House of Commons are called before an inferior tribunal for making public that which they thought was essential for the discharge of their legislative functions—a privilege enjoyed from ancient times—long before the Revolution—recognized by the Bill of Rights, and which since the Revolution has never been questioned by any one but the plaintiff. The Commons stand upon their defence for having made public an alleged abuse in the management of gaols, requiring, if it does exist, a legislative remedy, for which the public mind ought to be prepared. The House of Commons, representing the third estate in the realm, having with the Lords and the Queen supreme legislative authority, and by their own peculiar power a right to inquire into the administration of justice and to superintend all inferior tribunals, are called upon before one of those tribunals to discuss the extent of the privileges which they claim to possess.

Privilege
claimed, not
personal.

This is not a question respecting any personal immunity claimed by members of the House of Commons, as to exemption from arrest for debt—or whether they are liable to be sued when Parliament is sitting—or whether their goods are privileged—or respecting any personal advantage

which may arise to them. From the privilege now called in question, no individual member can derive the smallest private benefit. It is claimed only for the public good. The House of Commons have long felt that they could not adequately discharge either their legislative or their inquisitorial functions without freely communicating to the public the grounds upon which they proceeded. This is not a country in which it can be said that the people have nothing to do with the laws but to obey them. The grounds upon which laws are framed must be understood and approved of, and then the laws will be respected and cheerfully obeyed.

The privileges of Parliament are claimed as "the birth-right and inheritance not only of Parliament itself, but of the whole kingdom" (a).

The House of Commons, in instructing counsel to appear to this action, do not mean to submit their privileges to the decision of any other tribunal except the House of Commons.

They still claim to be the sole and exclusive judges of their own privileges; but they have thought that this Court should be informed, that the act complained of was done by their authority, in the exercise of a privilege which they assert. By appearing in the names of the defendants against whom this action is nominally brought, and pleading in bar that the act was done by the command and authority of the House in the exercise of privilege, it is submitted (the facts alleged being admitted) that it only remains for the Court to give judgment for the defendants.

To suppose that by their so appearing and pleading the privileges of the House of Commons are submitted to the judgment of this Court, is to confound two things which are clearly distinct. Such confusion on such a subject could only arise in minds so little imbued with legal principles as to suppose that the liability for libel depends upon whether the publication is distributed gratuitously, or upon payment of a part of the price of the printing, so as to prevent a wasteful circulation.

(a) Address by both Houses of Parliament, 2 Parl. Hist. 978.

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According to various precedents to be found in the proceedings of both Houses of Parliament, and in cases decided in Courts of Law, a different course might undoubtedly have been pursued, and summary proceedings might have been instituted against the party bringing an action for the direct purpose of calling in question the undoubted privileges of the House of Commons, and appealing to an inferior Court to have those privileges over-ruled. Not only might this summary proceeding have been justified by what has been often done by the House of Commons and the House of Lords, but by what has been done by the Court of Exchequer and the Court of Chancery, and by other Courts in Westminster Hall.

Reasons for
pleading to
action.

It has been thought the more expedient course not to seek to interrupt this action by any extraordinary stretch of authority, but to refer the case to the consideration of this Court. One strong argument is, that it is much better to allow justice to proceed in its usual course, and to place confidence in the constituted tribunals of the country. There is likewise this great advantage in the present mode, that it gives the plaintiff an opportunity of denying that the act was done under the authority of the House of Commons, and also enables him not only to deny that the act was done under the authority assumed, but to plead that there was an excess. The two Houses of Parliament have no reason to distrust the judges of the common law. Formerly, while the judges were the dependent creatures of the crown, they were the enemies of the people; but since the judges were happily made independent, they have steadily supported the privileges of Parliament, equally disregarding the favour of the crown, and despising to court a short-lived and despicable popularity.

The protest, therefore, is respectfully made, that the Houses of Parliament, being Courts of exclusive jurisdiction, are, by the law of England, the sole judges of their own privileges, and that no action can be maintained for an act authorized by them.

A short statement of the record only has been given on the other side; but it is considered right to enter into it more minutely, and to consider not only the arguments and authorities brought forward for the plaintiff, but to lay before the Court all the authorities and arguments to be found on either side, which bear upon the subject.

On examining the record it may be admitted that the declaration is good upon the face of it. It sets out a publication, which, if issued to the world without authority, would give to the plaintiff a just cause of action; it imputes to the plaintiff that he had published an obscene book, which was found in the hands of the criminals confined in Newgate. But, when it is admitted that this is a criminatory publication, it is not admitted that it is a libel. A libel is a criminatory writing published without just occasion or authority. Suppose that there had been an action brought for preparing an indictment, or for a report of either House of Parliament which had been confined to the use of the members, or for a letter in answer to an inquiry respecting the character of a servant, the same admission must be made, because the declaration would disclose what is *primâ facie* a good cause of action. But that does not admit an indictment is a libel? or that a report confined to the use of the members of the House of Commons is a libel? or that an answer to an inquiry respecting the character of a servant is a libel? Those are all acknowledged to be publications for just cause, and, whatever loss they may occasion to the subject of them, it is *damnum absque injuriâ*: it is not a libel; and no action can be maintained by the party alleging himself to be defamed. Much ribaldry has been resorted to upon this subject. A libel-shop has been said to have been opened by the House of Commons,—the persons who use that language not being able to apprehend the distinction between a criminatory publication under lawful authority, and that which is without lawful authority, and issued maliciously and with the intention of defaming.

To this declaration there is a plea in bar,—not to the

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per where no
right of action.

jurisdiction,—and that perhaps some may say takes away the opportunity of contending that this Court cannot judge of the existence of the privilege claimed.

The distinction between pleas to the jurisdiction and pleas in bar is well known. There was a plea to the jurisdiction in the case of *The King v. Williams* (a), the authority of which is surrendered, as it indeed was impossible to be maintained; but by surrendering that case, the plaintiff is out of Court. With the exception of there having been in that case a plea to the jurisdiction, instead of a plea in bar, the two cases are identical.

The plea to the jurisdiction is proper when the defence is, that there may be a just cause of action triable elsewhere, but that the action is not brought in the proper forum; as if ejectment were brought in the Courts of Westminster for land held in ancient demesne; but, where a Court has jurisdiction over the subject-matter disclosed in the declaration, though not to inquire into the authority on which the defence is founded, there a plea in bar is the only plea that can be pleaded.

This doctrine was considered, and fully established, in the case of *The King v. Johnson* (b). It was laid down there, that a plea to the jurisdiction is bad, unless the plea discloses another Court where the question is cognizable.

It is not contended that there is another Court of Law where Mr. *Stockdale* might have redress for the injury inflicted upon him, but that he has no cause of complaint whatsoever. The defence is, that the writing was published by the authority of the House of Commons in the exercise of their privilege; that it is a lawful publication, and that there having been no wrong, there is no remedy. But by this plea it is not at all admitted that the Court can entertain the question of privilege. This may be illustrated by similar actions, where the defence arises not upon the act of either House of Parliament, but upon the proceedings of a court of justice.

Suppose, in an action of trespass and false imprisonment

(a) 13 How. St. Tr. 1369.

(b) 6 East, 583.

that the defendant justified, alleging that the plaintiff was taken under a ca. sa. upon a judgment of the Common Pleas, this Court could not inquire as to whether that judgment was right or wrong. Suppose that the justification were under the sentence of a Criminal Court, that the plaintiff had been tried and convicted, and sentenced to imprisonment, the propriety of that judgment could not be inquired into upon a demurrer to the plea; then shall it be said that, upon such a justification, privilege in every case is to be decided in a Court of Law? To that extent the argument on the other side goes. It is said the times of ignorance and tyranny have passed away, during which alone was privilege respected; and now every privilege claimed by either House of Parliament is to be submitted to the consideration of every Court of Law; because, of course, there is no distinction in this respect between the Court of Queen's Bench, and the county court, or hundred court, or the lowest court in the kingdom. Suppose that, to an action of trespass and false imprisonment in this Court, it were pleaded, by way of justification, that the plaintiff being summoned to attend the bar of the House of Commons did not attend, and therefore he was committed; or that, having attended, he prevaricated, and therefore was committed; upon a demurrer to such a plea would it be open to this Court to say that the House of Commons has no right to summon witnesses, or to commit a witness for prevarication? Suppose that a member is committed for some outrage in the House—for words spoken in his place—or for assaulting the Speaker in the chair—he brings an action of trespass and false imprisonment—the commitment under the authority of the House is pleaded in bar to the action,—would it be competent for this Court to decide that there was no privilege in the House of Commons to commit a member for words spoken in his place, or for assaulting the Speaker in the chair? From the manner in which the case has been argued, every privilege, not only of the House of Commons, but of either House, may be brought before the lowest tribunal in the country, and may be sub-

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jected to their judgment; and it will depend upon the opinion of an attorney's clerk, sitting as an assessor for the sheriff, or for the steward of the lord of the manor, what shall be the determination upon the nicest and most important questions of privilege.

When it is pleaded in bar that this act was done by the authority and command of the House of Commons, the Court is respectfully informed that it is authorized by the House, and was done in the exercise of privilege, and the Court is called upon to give judgment for the defendants, without inquiring into the existence of that privilege.

Plea consistent with exclusive jurisdiction of Commons.

This plea is consistent with the doctrine that, by the law and privileges of parliament, the two houses have the sole and exclusive jurisdiction to determine upon the existence and extent of their privileges. Just as a plea under a commitment by the Court of Common Pleas or Exchequer, for a contempt, would be consistent with the doctrine that those Courts have the sole and exclusive jurisdiction to determine what shall be a contempt. This plea is likewise consistent with the doctrine, that for a Court of Law to decide upon matters of privilege contrary to the law of parliament, as settled by the determination of the two Houses of Parliament, would be erroneous, and a breach of the privileges of parliament. Certain resolutions of the House of Commons have been alluded to, as if they were intended to be in the smallest degree in derogation of the powers and authorities of courts of justice, or were at all inconsistent with the reverence due to judges. They had no such intention. [The Attorney-General then stated the plea.] To this plea there is a special demurrer,—not for any informality; admitting, therefore, that the document had become part of the proceedings of the House of Commons, and was published by the authority of the House: but the causes of demurrer set forth consist of certain truisms, which of course are all admitted.

No power is claimed in the House of Commons to supersede, suspend, or alter the law of the land, or to create any new privilege to themselves; but only the power to de-

clare what is the law of the land respecting privilege, which is part of the *lex terræ*. The House of Commons and the House of Lords are the proper tribunals to which the administration of that peculiar branch of the law is entrusted by the constitution; but, in declaring what is privilege, they have no right to alter the law of the land any more than this Court, when a question of common law comes before it, to alter the common law without being guilty of a great offence. The House of Commons cannot create any new privilege of their own authority; that would be altering the law of the land. But they have the power of saying what is the law of Parliament; as it is entrusted to this Court to say what is the common law,—and an assumption of a greater power by either House of Parliament, or by the Courts of Law, would undoubtedly be dangerous to life, liberty, property, and character. There being, therefore, no informality pointed out in the plea, it is submitted to be quite clear that upon this record the defendants are entitled to judgment.

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Claim of
Commons,
only to *declare*
the law of
privilege.

Three propositions are relied upon by the defendants. First, as the alleged grievance for which the action is brought arises from an act of the House of Commons in the exercise of privilege claimed by them, the question of privilege is raised directly, and this Court has no jurisdiction to inquire into the existence of the privilege, and is bound to give judgment for the defendants.

Propositions
relied on by
defendants.

Second, if the question of privilege were supposed to arise in this case incidentally, instead of directly, still upon this record the Court cannot inquire into the existence of the privilege, and is bound to give judgment for the defendants.

Third, under a solemn protest that this question is not within the jurisdiction of this Court, it will be shewn that, if it were open to inquire into the existence of the privilege, the privilege does exist, and the Court is bound to give judgment for the defendants.

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tion: The
power claimed
by the H. of
Commons is a
privilege.

I. There can be no doubt, that what is complained of here must be taken to have been done by the authority of the House of Commons, and that if the order of the House of Commons amounts to a justification, there is a justification.

The word *privilege* is applied to two matters which are very distinct from each other. There is, first, privilege by which members are exempt from arrest, and enjoy certain other personal immunities, formerly extending to their servants, till abrogated by act of parliament (*a*)—not tacitly abandoned, as is supposed by some. There is another branch of privilege which may more properly be called the power belonging to each House of Parliament as a body, as the power to summon witnesses, the power to require the production of papers and records, the power to commit, the power to print for the use of the members, which is not disputed, and the power to print any part of their proceedings for public information, which is to be established. All these are considered within the general word *privilege*. It is in the latter sense that the power in question is to be considered privilege, being a power belonging to the House of Commons as a body. It is a power which is claimed by them for the public benefit. Still it ranges itself within the law of privilege just as much as any personal exemption. [Lord Denman C. J. The word *privilege* does not occur in this record at all.] Privilege is not mentioned *eo nomine*. The plea sets out the substance of the thing. It was unnecessary to allege that this was a privilege; it is shewn to be a power exercised by the House, just as in *Burdett v. Abbot* (*b*), where also the justification did not rely on the privilege of Parliament by that name. When an act is justified under the authority of either House of Parliament, the word *privilege* need not be used. When it is shown to be the act of either House, the Courts of Law are satisfied. Where there is a commitment—as in Lord Shaftesbury's case (*c*), and the case of *The Queen v. Paty* (*d*), and in *Flower's*

(*a*) See 10 Geo. 3, c. 50.(*b*) 14 East, 1.(*c*) 6 How. St. Tr. 1269.(*d*) 2 Ld. Raym. 1105.

case (a), and *Rex v. Hobhouse* (b)—the return to the habeas corpus does not make use of the word *privilege*. This power of publishing for the use of the members, and for the information of the constituent body, is just as much privilege, if it does exist, as the power of summoning witnesses, the power of committing for prevarication, or any, the most uncontested power belonging to either House of Parliament.

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It must be taken that this act of which the plaintiff complains is the act of the House of Commons in the exercise of privilege; and it is an act done by them within their general jurisdiction. It is not necessary to labour this point, because whatever act is done by either House, when it comes to be considered in a Court of Law, must be supposed to be within the jurisdiction of the House, and every intendment is to be made in favour of it. But this act, in ordering the publication of this report, was undoubtedly within the general jurisdiction of the House of Commons. It is admitted that the House may lawfully print and publish their proceedings, so that they are not criminatory. This is alleged to have been printed and published, by order of the House of Commons, as part of their proceedings; the demurrer allows that it is part of their proceedings. Then it is not denied that either House of Parliament may print and publish whatever they please, even if it be criminatory, for the use of their members, so that it be confined to the members of the House—a distinction which it is impossible to support.

Exercised by
 H. of Com-
 mons within
 their general
 jurisdiction;


This is a proceeding of the House of Commons, and admitted to be so, just as much as any examination at the bar of the House of Commons, or any report of a committee. There might have been a select committee appointed to inquire into the state of prisons, and the report of that committee to the House would have contained the examination of these inspectors,—which, when adopted by the House, would have been beyond all question part of their proceed-

might have
 been exercised
 in other ways.

(a) 8 T. R. 314.

(b) 3 B. & Ald. 420; S. C. 2 Chitt. 207.

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ings. So those inspectors might have been examined at the bar, their examination might have been taken down and entered upon the journals, and entered upon the votes, and that would have been part of the proceedings of the House. For any thing that appears, there may have been a debate upon the subject of prisons. This report and the reply may have been read from the beginning to the end; the House may have deliberated upon them, and may have ordered them to be entered in their journals. This publication is a proceeding of the House, therefore, just as much as a bill that may be passing through Parliament, or any of its resolutions or votes, whether legislative or inquisitorial. The same remark applies to the original report and to the reply. The one was laid before the House under the special provisions of the act of parliament, and the other was ordered to be laid before the House; by a vote of the House it was ordered to be printed; it is alleged to be part of the proceedings of the House, and published as part of its proceedings,—which the demurrer admits.

If the defendants are liable, the Speaker and all the members are liable.

The question arises whether an action can be maintained against these defendants, as printers of the House, for this act, which was done by the authority of the House, in publishing this report as part of the proceedings of the House. It may just as well be averred that an action will lie against the Speaker. Though *The King v. Williams* (a) has been renounced, it must be insisted that the Speaker and all the members of the committee, and all the members of the House of Commons who concurred in the vote, would be liable. The authority for doing the act originates in the resolution of the House of Commons. When the House of Commons comes to a vote that an individual shall be committed, and that the Speaker is to make out the warrant, and the Speaker makes out the warrant, and an action is brought against the Speaker,—is not that for an act which is to be considered done in Parliament? It is by the authority of Parliament, and by the order of the House,

(a) 13 How. St. Tr. 1369.

that the act is done; and if it were not for the privilege, it is quite clear that all the members of the House of Commons that concur in the vote would be liable to an action. This test therefore is suggested,—setting aside privilege,—who would be liable for the grievance complained of? If the members of the House of Commons would be liable, then it is an act done in Parliament, and the members would be liable, because the act is done under their authority and by their command. Where, therefore, is the line to be drawn? If Messrs. *Hansard* are liable as the servants of the House, acting by the direct authority and command of the House, the Speaker would be liable. If the Speaker would be liable, the members of the committee who superintended the publication of this report would be liable; and where is the line to be drawn, without saying that an action could be maintained against any member who concurred in the vote for printing and publishing?

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But it is submitted that this being a question of privilege, and the question arising *directly* upon the record, the Court is not permitted to consider whether the privilege exists or not. It clearly is a question of privilege. The point is, whether the House of Commons have the power which they claim. Wherever the question is whether either House, as a House of Parliament, has the power to do a particular act which it has done, that is a question of privilege—privilege not being to be confined to personal immunity, as freedom from arrest, but extending to all the powers that belong to either House of Parliament as a body.

The question
 of privilege
 arises here
directly.

Then this being a question of privilege, the next proposition is, that it arises *directly*, and therefore over this question no Court of Common Law has any jurisdiction. The cases of *Donne v. Walsh* (a), *Benyon v. Evelyn* (b), and *Barnardiston v. Soame* (c), have been cited. The last was no question of privilege whatever. It was held in that

Where the
 Courts have
 taken cogni-
 zance, the
 question rose
incidentally.

(a) 1 Hats. 41, 3d ed.

(c) 6 How. St. Tr. 1063.

(b) O. Bridgman, 324.

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case, in the first instance, that an action could be maintained for a double return, the judgment being afterwards reversed upon writ of error, when it was held that, at common law, no such action could be maintained. In *Benyon v. Evelyn* (a) and *Donne v. Walsh* (b) the question of privilege did arise; but did it arise directly? It arose *incidentally*; and no case has been or can be cited in which the Courts of Common Law have taken cognizance of a question of privilege arising directly, except *Rex v. Williams* (c), which is renounced.

No case being cited in which the question of privilege arising directly was entertained by a Court of Common Law, various instances can be adduced to shew that, wherever the question has arisen directly, with the exception of *Rex v. Williams* (c), the Courts of Common Law have expressly declared they had no jurisdiction; and it would be strange if they had, because this would be an appeal from what amounts to an adjudication by a superior court, to a court which is clearly subordinate.

Jurisdiction
renounced
where the
question arises
directly.

The instance in which the point has most frequently been raised, is where writs of habeas corpus have been sued out upon commitments by the two Houses of Parliament. Upon the return to the habeas corpus, stating that the party applying for the writ was committed by the Lords, or Commons, what have the Courts uniformly said? "We have no jurisdiction, be the commitment right or wrong. Here you can have no redress." They have said that there would be a conflict, always to be avoided, between the Courts of Law and the Houses of Parliament, if the propriety of such a commitment were to be inquired into. They have said that the question arose *directly*, whether the Houses of Parliament had the power of commitment which they assumed; and therefore a Court of Common Law would not take cognizance of the question.


Again, where an action of trespass and false imprison-

(a) O. Bridgman, 324.

(b) 1 Hats. 41, 3d ed.

(c) 13 How. St. Tr. 1370.

ment is brought for a commitment, there the question arises directly. It cannot be said that the question arises directly only where the declaration discloses the manner in which the grievance was committed. Although the declaration neither uses the word *privilege*, nor shews that any question of privilege could arise, still it cannot be said that the question can never arise directly, if it be disclosed by the plea. In an action of trespass and false imprisonment, by either House of Parliament, there being a justification under the order by which the commitment takes place, does not the question arise directly?

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This question arises directly *where there is an act of either House which is sought to be overruled. Where the act complained of is justified by the authority of either House,* in those cases the question whether the House has that privilege or not directly arises. *ly.*

Definition of
 the question
 arising direct-

It undoubtedly so arises in the instance of an action of trespass and false imprisonment, where, by way of plea in bar, there is a commitment by either House pleaded by the defendant, with a demurrer to the plea. No question can arise more directly. Does not the question of privilege arise just as directly here? This is not an action of trespass for an injury done to the person; but it is an action upon the case for an alleged injury to the reputation of the plaintiff; and the justification is under the authority of the House of Commons. In *Burdett v. Abbot* (a) the question arose directly, that being an action of trespass. Would it not have arisen directly in the same manner if Sir Francis Burdett had brought an action for a libel, considering the warrant of the Speaker a libel, which he might have done, and raised the question just as much as by his bringing an action of trespass and false imprisonment? Suppose that he had declared that Mr. Abbot, maliciously intending to defame him, had published a wicked and scandalous libel, containing therein a statement that Sir Francis

Instances
 where the
 question of
 privilege arises
 directly.

(a) 14 East, 1; 4 Taunt. 401; 5 Dow, 165.

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Burdett had published a gross and scandalous libel upon the House of Commons,—that would have been as good a cause of action as is disclosed by the present declaration. A plea would have been necessary; and the plea would have been the vote of the House of Commons, ordering Sir *Francis Burdett* to be sent to the Tower under a warrant from the Speaker. The alleged libel was the warrant by which the intention of the House of Commons was to be carried into effect; and the question of the privilege or power, in the House of Commons, to commit one of its members, upon such a complaint, would have arisen as directly in an action upon the case, as it arose directly in the action for trespass and false imprisonment.

Suppose an action were brought against the sheriff for the escape of a person arrested for debt, and he were to plead that the party was discharged by the authority of the House of Commons, that the party discharged had been elected a member of Parliament, and by the Speaker's warrant was discharged, and there were a demurrer to the plea. The question most undoubtedly would arise directly, for the Court would be called upon to determine whether the House of Commons had a right to discharge from prison that individual confined for debt, who was elected a member of their House. It therefore never can be taken as a test whether the declaration discloses the question of privilege. Where it arises incidentally, it is perhaps necessary that the Court, resorting to the best means of information it can possess, should decide the question. An action is brought for goods sold and delivered. If the defendant pleads he is a member of the House of Commons, and that, as a member of the House of Commons, he is privileged from being sued while Parliament is sitting, and merely concludes his plea by that allegation, the question there, whether there be such a privilege, arises incidentally. Where there is no resolution of the House of Commons which is vouched, where there is no act of the House of Commons which is complained of, and there is no adjudica-

tion of the House brought before the Court, and there is simply a claim by the individual sued that he is not bound to answer to the action, under such circumstances necessity may require that the question should be inquired into. Absurd consequences would follow if, upon the mere claim that there is privilege, without any adjudication of either House of Parliament for the existence of that privilege being brought before the judges, they were to stay their proceedings. Necessity, therefore, may require that, where the question of privilege arises incidentally, the Courts should decide it. But necessity, which gives, also limits, the jurisdiction, and it is only where it is necessary that the existence of the privilege should be inquired into, that the power to inquire can be exercised. Where an act of either House of Parliament is complained of, there is no such necessity. It appears that the privilege has been claimed and acted upon, and is asserted by the superior Court; and for that reason all that the Court of Law has to do, is to give effect to the adjudication upon the existence of the privilege. No difficulty arises. Where any question which, generally speaking, is referred to a Court of exclusive jurisdiction, does incidentally arise before another court, the rule is, that the judgments of the court of exclusive jurisdiction are conclusive. Questions of privilege belong exclusively to the Houses of Parliament, which for this purpose are Courts of exclusive jurisdiction.

The object in allowing privilege to the House of Commons was, that it might be independent of the Crown and of the House of Lords, and that it might usefully exercise the functions assigned to it by the constitution. Without the power of deciding upon its privileges *proprio vigore*, it never could have been protected.

One ground which shews that on questions of privilege the two Houses of Parliament have an exclusive jurisdiction is, that the Law of Parliament is different from the Common Law. It is part of the *lex terræ*. So is Equity; so is the law that prevails in the Ecclesiastical Courts; so

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tion arises in-
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Law, adminis-
tered by exclu-
sive tribunal.

is the law that prevails in the Court of Admiralty. Those are all branches of the *lex terræ*, but they are not the Common Law. This Court is not supposed to be acquainted with Equity, which is to be administered by the Courts of Equity; nor with the Law of Parliament, the administration of which is entrusted to the two Houses of Parliament. That law is entirely different from the Common Law, and is not supposed to be known to Common Lawyers. Equity is really part of the *lex terræ*, but still this Court has no jurisdiction over Equity. No action can be maintained for a breach of trust. There may be a good remedy for a cestui que trust, or person beneficially interested, in the Court of Chancery, but this Court looks only to the legal estate, the incidents of which are governed by the rules of Common Law.

This branch of the law, called the Law of Parliament, is entirely different from the Common Law. It is not even necessarily a part of the Law of England. Parliament is now the Parliament of the United Kingdom of England, Scotland and Ireland. The judges of the Court of Queen's Bench can as little take notice of the Law of Parliament, as the judges of the Court of Session in Scotland. How are they to get at the Law of Parliament? If an action for trespass and false imprisonment is brought before the Court of Session in Scotland, and there is a justification under the authority of either House of Parliament, there can be no doubt that that tribunal would consider the defence as conclusive, and would not inquire whether the privilege existed or not; for how could they get at the knowledge of privilege? They are not English lawyers, and can hardly be supposed to have access to the journals of the two Houses of Parliament, if a search among those journals would give them the necessary information. They must say it is a question of privilege, and a question *alieni fori*.

The same question might arise in a court in the Colonies. The question might arise in one of those Colonies

where the Dutch Law prevails, or the French Law, or the Spanish Law. There might be an action brought in such a court for a libel, the publication being by the authority of the House of Commons, or for false imprisonment, the imprisonment being by the authority of the House of Commons. Then shall it be said that at the Cape of Good Hope, or the Mauritius, or Trinidad, the Court (the question arising directly—there being a justification under the authority of either House, which is admitted to be true in point of fact) would be justified in inquiring whether the House of Lords, or the House of Commons, have the right that they assume? Would not the Colonial Court be bound by the authority of the Houses of Parliament? If not, observe one of the consequences. The Court overrules the privilege. Then the privileges of the House of Commons are to be at their mercy, and the person who has acted under the authority of the House is to be punished by them according to their discretion. And then to what tribunal is the appeal? The appeal from the Colonies would be to the King in Council, and the privileges of both Houses of Parliament would come before the King in Council, or such councillors as the ministry of the day, to answer a particular purpose, might think fit to summon. So that whatever power the Court of Queen's Bench has to consider the question, the Hundred Court, the Borough Court, the Court of Session, the Sheriff's Court in Scotland, the Courts before any Baillie in Scotland, and every Colonial Court in the empire, has the same power.

The next consideration is the subordination of the Courts of Law to the Houses of Parliament. The incompetency of this Court to decide a question of privilege, where it arises directly, may be proved from the subordination of the Courts of Law to the Houses of Parliament.

It has been truly said, that formerly the Peers and Commons sat in one chamber and formed one body. The separation certainly did not take place till the latter end of the reign of *Henry* the Third; some say not even till the reign

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Parliament
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Houses.

of *Edward* the First. At that time the courts of justice were established ; they had the same powers that they now enjoy. When Parliament sat as one chamber, were not the Courts of Law subordinate to Parliament ? for not only was there a writ of error from the Courts of Law to Parliament, but the Courts of Law, it is well known, were in the habit of consulting Parliament before they decided upon any question of difficulty and importance that arose. Shall it be said that at that time of day, before the division of Parliament into two chambers, an act that was done by the whole Parliament might be reviewed by a Court of Law, the appeal being from that Court of Law to the Parliament, and not from the Parliament to that Court of Law ? Would it not have been a gross absurdity to suppose that an act done by Parliament could be questioned in an inferior tribunal ?

A division took place ; but suppose, before that division, there had been a commitment by the Parliament, could the validity of that commitment have been inquired into by any Court of Common Law ? There being an adjudication by the Parliament that a particular act should be done, and an action being brought for that act so ordered to be done, and it appearing upon the record that it was done by the authority of Parliament, an appeal lying from the Court of Common Law to Parliament, could a Court of Common Law have decided upon the legality of an adjudication by Parliament ? Suppose that, before that division, the Parliament had ordered that a particular paper should be published, by being stuck upon the gate of Westminster Hall, or according to any such method as they might have resorted to, and an action had been brought in a Court of Common Law, treating the publication as a libel, and there had been a justification that the publication was by the authority of the whole Parliament, sitting as one chamber, would it have been competent to a Court of Common Law to decide that this was an usurpation on the part of the Parliament, that

the act was illegal, and that an action could be maintained against the officer of Parliament?

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After the division into two chambers occurred, it may be laid down as a clear proposition, (which Lord *Ellenborough* has suggested (a) must be supposed to have been by act of Parliament), that whatever either House of Parliament afterwards did in the exercise of its privilege was the act of the whole Parliament, and had the same authority that would have been given to the act of the whole Parliament before the division.

Acts of either House are still supposed to be done by the whole Parliament. The most familiar instance is a writ of error to Parliament. That is not a writ of error to the House of Lords; it is not an appeal from the Court of Chancery to the House of Lords; it is an appeal to the Parliament; and the Commons, in point of law, are still supposed to form part of the appellate jurisdiction, and to concur in the judgment of the Lords. This subject is very minutely handled in Lord *Hale's* Treatise upon the House of Lords, and in Mr. *Hargrave's* Preface to that Treatise, pp. 15—128; and there cannot be a doubt that whatever is done by either House since the separation is still supposed to be done by Parliament; and a commitment by the House of Commons, or a commitment by the House of Lords, has precisely the same authority that would have belonged to a commitment by the whole Parliament before the separation into two Houses.

Acts of privilege of either House done by authority of whole Parliament.

Take an instance, since the separation, of an act done by the House of Lords. The House of Lords has still an appellate jurisdiction from this Court, and from all the Courts in Westminster Hall. Shall it be contended that this Court could decide that that which is done under the authority of the House of Lords is invalid? If so, the judgment of this Court would be reviewed by that very tribunal whose act had been invalidated. Suppose an action had been brought by Lord *Shaftesbury*, after his commitment by the

(a) 14 East, 137.

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House of Lords, and that there had been a justification under the authority of the House of Lords, and a demurrer to the plea, could this Court have entertained the question whether the House had the power to commit? There would have been a great difficulty in deciding that they had acted according to judicial authority, because it would have been the first commitment by the House of Lords, brought before a Court of Law, and there had been no adjudication in Westminster Hall by which such authority was ascribed to the House of Lords. Suppose, instead of suing out a writ of habeas corpus, he had brought his action for trespass and false imprisonment, would this Court have allowed the question to be entertained, whether the House of Lords had acted illegally in committing him to the Tower, when there would have been a writ of error upon that judgment to the very House of Lords whose act was said to be inoperative? Is not this a clear subversion of the subordination of tribunals, which the constitution has established? As far as the House of Lords is concerned, things remain precisely in the same state as that which existed before the separation of the two Houses of Parliament.

Publication of
trials ordered
by H. of
Lords.

The House of Lords have repeatedly ordered papers to be published upon every trial that has taken place for 150 years, whether upon impeachment, or before the Lord High Steward. Now it has been laid down by some judges, that the publication of a trial is not necessarily and universally a lawful publication, and that, if it reflects upon a particular individual, it may be made the subject of an action for libel. Suppose, then, an action for a libel to be brought by a person who says he is defamed by an account of a trial published by the authority of the House of Lords, and the defendant to justify, as in this case. The cases are quite parallel. The justification in that case would be under the authority of the House of Lords, who ordered the publication to issue for public information. On a demurrer to that justification, the question would arise directly, whether the House of Lords had authority to order such a pub-

lication, or whether their order was a justification to the party publishing? Would this Court inquire whether the House of Lords had authority to order this publication or not? Would it not be enough to find that this was the deliberate act of a tribunal to which the decisions of this Court are to be referred? Where any question on the legality of any act of the House of Lords arises, the House of Lords being the Court of *dernier resort*, the tribunal possessing the highest judicial power in the realm, it would be incompetent for any inferior tribunal to inquire whether the act of the highest tribunal was legal or otherwise.

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But have not the House of Commons a co-ordinate and equal authority? It was once argued by Sir *Robert Filmer*, that the House of Commons was a mere excrescence; that it existed by the pleasure of the King and the Lords; that whatever power was exercised by it might be considered as *octroyé* by the Crown; that it had no independent existence, and was hardly to be recognized as a part of the constitution. It would appear from the celebrated argument written by Sir *Robert Atkyns*, but not spoken, in the case of *The King v. Williams* (a), that those notions at that time of day were very prevalent; and a great part of that argument is occupied in shewing that the House of Commons has an independent existence like the House of Lords.

H. of Com-
mons has co-
ordinate au-
thority.

In the present day there have been publications very derogatory to the powers of the House of Commons, and utterly denying that it has any privileges whatever.

Lord *Brougham*, in his introduction to the case of *Wellesley v. The Duke of Beaufort* (b), (which was clearly a right decision,) has expressed to the world sentiments which may be considered as committing himself to one side, and which may be considered as having a tendency to fetter the free judgment of others. His lordship says, that "a new and extravagant claim has been asserted on behalf of the

(a) 13 How. St. Tr. 1400.

(b) Lord Brougham's Speeches,
vol. iv. p. 341.

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House of Commons, to publish libels through irresponsible agents." But it is even suggested by the noble lord, that there is no privilege in either House of Parliament; for he says, "Nor, it may be observed, is there a single argument ever urged in favour of privilege, which would not serve as a pretence for allowing all the members of both Houses to rob and murder with impunity on the highway."

Ample powers
of the H. of
Commons.


But the acts of the House of Commons are to be considered as the acts of all the Commons of the United Kingdom. Lord *Holt* says, "It is not to be doubted but that the Commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore, by the Constitution of England, it has been directed that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of England vested in them" (a). That is the language of the constitution from the earliest times.

By the 15 *Edw. 2*, it is declared, "The matters, which are to be established for the estate of our lord the King, and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded and established in parliaments by our lord the King, and by the assent of the prelates, earls, and barons, and the commonalty of the realm, according as it hath been heretofore accustomed."

The whole commonalty of the realm, therefore, are supposed to be virtually assembled, and to form the House of Commons. They are entrusted with legislative power, and are, besides, the grand inquest of the nation. The House of Lords has authority to inquire, but, according to the constitution, a power rarely to be exercised, and only in default of the Commons doing their duty. It belongs especially to the House of Commons to make inquiry, to superintend the administration of the laws, and to control the courts of justice. Whenever there is any corruption

(a) *Ashby v. White*, 2 *Ld. Raym.* 950.

existing, or any oppression, it belongs to the House of Commons to inquire; it belongs to the House of Lords to judge; and the right to publish its proceedings is more particularly essential to the House of Commons, in the exercise of its inquisitorial functions.

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At the commencement of every session there is appointed a grand committee of justice, before which complaints are to be brought from every tribunal, in which law is administered within the limits of the jurisdiction of the House of Commons. The House of Commons claims all the authorities of a Court. Whether it be a Court of Record has been questioned. Sir *Edward Coke* strenuously maintained that it was a Court of Record. But whether it be a Court of Record or not, is utterly immaterial to any question in this cause. The Court of Chancery is no Court of Record, but it has not less the power of enforcing its own decisions.

Power to punish judges.

It is laid down in *Comyn's Digest* "Parliament," (E 14) under the head "Committee for Justice:" "A committee for justice may summon any judges, and examine them in person, upon complaint of any misdemeanor in their office,"—"any judges"—the judges of the land—the King's judges included.

In 1 *Siderfin*, 338, in the 19th of *Charles 2*, "complaint was made against *Keeling*, Chief Justice of the King's Bench, for misdemeanors done in his said office, such as fining of juries, &c., which were examined, and he appeared in person before the committee, and also in the Commons' House, and he was discharged."

Keeling was Chief Justice of this very Court, yet no question was made as to the legality of summoning him before the Committee of Justice, and making him answer, not respecting his decisions in point of law; if those had been erroneous, the House of Commons had no jurisdiction to inquire into them; but with respect to the fining of juries and other misconduct which was imputed to him in his

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office, for which the law of the land gave no remedy or redress. [Lord *Denman* C. J. Can you say that after *Bushell's* case (a)?] *Bushell's* case amounted to this, that *Bushell*, being fined for delivering a verdict, and imprisoned for not paying the fine, was discharged upon a habeas corpus, by the Court of Common Pleas; but it was held, that no action could be maintained for the imprisonment he had suffered. *Hale* C. J. strongly discouraged the action brought for redress, and said, "They will have a cold matter of it" (b). And why did *Bushell* and the other jurymen, who served on the trial of *Penn* and *Mead*, obtain their liberty? It was because they were committed by a Court of Oyer and Terminer at the Old Bailey, an inferior tribunal. Had that commitment been, not by the Court of Oyer and Terminer, but by *Keeling* C. J. and his companions, sitting on the bench, there would have been no legal redress even for the imprisonment; because the Court of Common Pleas would have said, "This is a Court of co-ordinate jurisdiction, we cannot review their decisions."


Instances of
judges punish-
ed.

There have been many instances of judges who have been summoned before the House of Commons to answer for alleged misconduct in their office. Sir *R. Atkyns* says (c), "I myself have seen a Lord Chief Justice of this Court, while he was Lord Chief Justice, a learned man, by leave from the House of Commons, pleading before that House for himself, and excusing what he had done upon a trial that came before him in the west, whereof complaint was made to the House. And he did it with that great humility and reverence, that those of his own profession, and others, were so far his advocates, as that the House desisted from any further prosecution." This was not, of course, for any point that had been improperly ruled by the Lord Chief Justice, but for some oppression or corruption that had been imputed to him, and for which the law gave no regular redress.

(a) *Vaugh.* 135; *S. C. T. Jo.* 13. (c) 13 *How. St. Tr.* 1413.(b) 1 *Mod.* 119.

Since the Revolution, the same course has been pursued. Chief Justice *Pemberton* and Mr. Justice *Jones* were summoned before the House of Commons, and committed by the House of Commons for misconduct. It might be supposed, from the account of *Jay v. Topham*(a), that the charge was unfounded; for according to the account there given the decision was perfectly correct, there being no plea in bar, but only to the jurisdiction, and the plea not covering the whole declaration; but it will be shewn that they were justly amenable to the displeasure of the House of Commons, for that a plea in bar had been pleaded; and though they did not in the first instance acknowledge it, they afterwards did acknowledge it; and they must be considered as having been in concert with the Duke of *York* and his minions to pervert the law for the purposes of oppression.

That such a power still exists in the House of Commons, no one can deny; although, from the pure administration of the law in this country for many years, there has been no occasion for the exercise of it; but even in our own time a complaint against an Irish judge has been entertained before the House of Lords(b). Although the Queen's Bench is the highest Criminal Court in Westminster Hall, and though a writ of error lies into this Court from all the inferior criminal courts, and it has power to prohibit inferior courts which exceed their jurisdiction, and to award a mandamus to inferior courts to execute the duty imposed upon them by law, still this Court has no more power and authority to entertain this action, than the lowest court in the land. Even the high prerogative writs of mandamus and prohibition cannot be directed by this Court to the House of Commons or the House of Lords. Prohibition does not lie to the House of Lords against hearing an appeal; nor a mandamus to the House of Commons, directing them to grant a sum of money, or to admit a member, who alleges that he is duly elected.

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Same power
 in H. of Com-
 mons now.

(a) 14 East, 102 n.

(b) Mr. Justice *For*. See 45 Lords' Journ. 662; 7 Parl. Deb. 752, 788.

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The Court of
Queen's Bench
no more juris-
diction on pri-
vilege than the
other Common
Law Courts.

This Court, in respect to this action, has no power or privilege whatever, except that it is a mere Court of Common Law.

This action might have been brought in a County Court, without any writ of justices, laying the damages at 39s. By a writ of justices, it might have been brought in a County Court, laying the damages at any amount. It might have been brought in a Borough Court, or any court which has cognizance of an action on the case; and if the Queen's Bench has jurisdiction to inquire whether this privilege exists, then all those inferior tribunals would be vested with similar powers.

Now does not it seem monstrous to say that, when the question arises directly, it should be competent to a County Court before the sheriff, or to the attorney's clerk who represents him, to inquire whether the House of Lords or the House of Commons has the privilege which it claims or is guilty of usurpation? Is not there subordination in a County Court to the House of Lords? It may be conceived that there is a tribunal—a court of justice—vested by the legislature, with supreme and paramount authority; and such a court of justice exists in the United States of America. The Supreme Court there has authority to decide between the different states that form the union, and to determine whether an act of Congress is legal or illegal, and to decide all questions that arise between the whole union and each separate state, or among the states *inter se*. There might have been a tribunal established in this country with power to control the two Houses of Parliament, and with authority to say whether they exceeded their jurisdiction or not. But is there such a tribunal? From the Supreme Court in the United States there is no writ of error, there is no appeal to Congress. The framers of the American constitution were not guilty of such absurdity as to suppose that judges are to sit in judgment upon those who are to be their judges. Their court is supreme; from its

decision there is no appeal. According to the constitution of the United States of America, the decisions of this high court are final and conclusive; and therefore there is no absurdity in that tribunal reviewing the acts of Congress. But from all judicial decisions in this country there is an appeal to Parliament. Parliament with us is paramount and supreme. According to the constitution of the United States, Congress has only a certain limited jurisdiction. It can only make laws upon particular subjects, and to a particular extent, and when it exceeds those limits, its acts have no authority.

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The administration of the law of Parliament belongs to the two Houses of Parliament, just as the revenue law is referred to the Court of Exchequer, as the ecclesiastical law is to the Ecclesiastical Courts, and as the law of nations is referred to the Admiralty Court, and as equity is referred by the constitution of the country, not to the Courts of Common Law, but to the Courts of Equity. It has been found convenient, even with regard to subordinate branches of the law, that particular matters should be referred to particular tribunals, that the judges of those tribunals might devote themselves to those branches of the law, and that there might be an uniformity of decision, which could not be expected, if a great number of co-ordinate courts had co-ordinate jurisdiction.

Exclusive jurisdiction of Houses of Parliament on law of privilege.

From the nature of the thing it is indispensably necessary that the law of Parliament should be referred to the two Houses of Parliament, as courts of exclusive jurisdiction. They could not exist without such power. Privilege is not granted by the Crown; it is as old as the prerogatives of the Crown, and is part of the Constitution of England. It would be utterly impossible that privilege could have existed beneficially, if the existence of the privilege had been referred to the decision of any inferior tribunal. From the necessity of the thing, Parliament, when it was one chamber, and the two Houses since the division, must necessarily decide upon privilege. The privileges of the House of Com-

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when judges
dependent.

mons are given to them for a protection against the Crown, and against the other House, and unless the House of Commons were itself the tribunal to decide upon this subject, their privileges would long ago have been extinguished, and nothing would have been left to the House of Commons, but to lay taxes upon the people, at the command of arbitrary ministers of the Crown.

We must not look to the manner in which the Courts of Law are now constituted, when the judges are independent of the Crown, and the administration of justice is pure and impartial. The law of Parliament and its bounds, and the jurisdiction to decide upon it, were all determined and settled at a period when the judges were the mere creatures of the King, when they held their office during pleasure, and if they did not gratify the Crown in any of its wishes, they were discarded, and others, more compliant, were placed in their stead. The law of privilege must have taken its origin even at a period when the King himself used to interfere in the administration of justice; and although the practice for the King to sit in Court had become obsolete in the reign of *James 1*, there can be no doubt that at an earlier period the King personally sat in his *Aula Regia* as a judge, and administered justice to his subjects. The judges called in were his assessors, and he either observed or despised the advice received from them. But long after the King had ceased to interfere, by sitting in courts of justice, the King was in the habit of writing letters to the judges, desiring them to decide in a particular mode in the causes which came before them; and to check that practice, several statutes have been passed.

There was an act passed in the 2 *Edw. 3*, c. 8, for that purpose. There was another in the 18 *Edw. 3*, st. 4, which contains the oath imposed on the judges, and, among other things, they were to swear not to attend to such letters, clearly shewing that, before that act passed, they had been in the habit of doing so. But it is not because the judges are now independent, that their jurisdiction is

extended. If *Tressilian* and *Belknap* had not this jurisdiction—and most melancholy would have been the situation of the liberties of this country, if such a power had been placed in the profligate hands of such judges as formerly existed—neither have the judges of the present day that jurisdiction.

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There is another danger, which may hereafter occur in some remote time, wherein there may be judges, not seeking to favour the Crown, but either mistaking the law, or wishing to extend the jurisdiction of their Court, or betrayed by a love of popularity, who may overrule a useful, and wholesome, and constitutional privilege, and produce consequences as mischievous as if acting from a desire to gain the favour of the minister of the day. A sentence from a judgment of Lord *Mansfield's*, is applicable here. “The judges are totally independent of the ministers that may happen to be, and of the King himself; their temptation is rather to the popularity of the day: but I agree with the observation cited by Mr. *Cowper*, from Mr. Justice *Foster*, that a popular judge is an odious and pernicious character” (a).

There were many struggles between the Crown and the House of Commons, as to the power of the Commons to inquire into the government of the country. There were various commitments of members of the House of Commons by *Elizabeth*. The same thing was attempted by *James I.* The same was attempted by *Charles I.*, and it was not until the Revolution that the liberties of the country were placed upon a firm foundation. During that memorable period, if it had been the law of England that privilege was to be decided by the King's judges, would that privilege have survived? It will be shewn, by authorities, not only parliamentary, but legal, that it was a power that the courts did not exercise or claim, and that it was held a constitutional doctrine, that it ought to belong to the two

(a) Cited from “*Lord Erskine's Speeches*,” vol. i. 379.

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Houses of Parliament, as courts of exclusive jurisdiction, to declare and decide upon questions of privilege.

With regard to contests with the House of Peers, there have been various struggles between the two Houses of Parliament. If this Court is to decide upon the privileges of the Commons, what will be the consequence? Will they decide upon every privilege? No distinction is drawn between this and any other privileges claimed by the House of Commons. Then all questions of privilege are said to be open to all Courts of Common Law. The consequence is, that they must all come to be ultimately determined by the House of Lords; for there is a writ of error or appeal, either mediately or immediately, from every court in the country to the House of Lords, upon all questions properly cognizable by those courts. If there be a dispute between the Houses of Lords and of Commons respecting privilege, which there has been, and may be, and probably will be again, then the existence of a privilege, claimed by the Commons against the Lords, is first to be decided in a Court of Law, and then finally by the Lords, who are parties to the dispute. In the struggles that have taken place, if such a power had existed, it would have been fatally exercised. In those cases which have been referred to, where there were commitments by the Commons in their struggles with the Lords, was any action brought in a Court of Common Law? When the counsel were committed, in *Shirley v. Fagg* (a)—when the counsel were committed, in *The Queen v. Paty* (b), was there any action brought? There was a writ of habeas corpus, in *The Queen v. Paty* (b), sued out, and eleven of the twelve judges held it was a question of privilege, upon which they had no jurisdiction. But if the Courts of Common Law had jurisdiction over it, an action of trespass might have been brought, and then this power might have been inquired into. Can the House of Lords be a paramount power upon such a subject? That

If Courts of Law have jurisdiction, the H. of Lords must finally determine on privilege.

(a) 6 How. St. Tr. 1121.

(b) 2 Ld. Raym. 1105.

House may be properly intrusted with questions which properly originate between subject and subject, or between the Crown and the subject in the inferior courts; but it could never be safely intrusted with the privileges of the House of Commons. The House of Lords is wholly irresponsible. It is beyond the control of the Crown. It is wholly independent of the people. If the House of Commons is guilty of any abuse, there is a clear remedy. There may be a dissolution of Parliament. There may be an appeal to the opinion of the people. Where there have been abuses in the House of Commons, that appeal has taken place, and it has taken place successfully. The errors that had been committed have been remedied and redressed. But what constitutional remedy is there for the errors of this supreme, paramount, and irresponsible tribunal, in which it is proposed to rest absolutely the power of disposing of the privileges of the Commons? It is to the jurisdiction of the House of Commons over its own privileges that we are indebted for the freedom we now enjoy; but instead of allowing it to be the tribunal which is to decide upon the subject, it is now proposed on the other side, first, that it is to be referred to the ministers and officers of the Crown, called judges, and then that it should come by way of appeal before the House of Lords, wholly irresponsible; and under no control, either from the Crown or the people.

The law supposes that this *Lex Parliamenti*, which is to be administered by the two Houses of Parliament, is not known to the judges of the common law, and that they have no means of judicially arriving at a knowledge upon the subject. We must consider, not only the judges of the superior Courts, who are not imagined by the law to be in Parliament, but also the freeholders who are sitting in the Sheriff's Court, the under-sheriffs, the bailiffs in the Manor Courts, who neither are, nor have been, Parliament men. How are those judges to know what the law of Parliament is? Shall it be said there is no privilege, except that which is confirmed by judicial decision? If so, many of the most

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necessary, the most usual and the best established privileges must be overruled, because they never have been questioned, and therefore there is no decision or adjudication in their favour. Are the journals to be searched? The journals comparatively go back a very little way. They only commence with the reign of *Edw. 6*, in 1547. But, even searching the journals would often be of little avail, because there are various essential privileges that are not to be found in the journals, but which depend entirely upon parliamentary usage; and how is that usage to be ascertained by the judges of the common law?

It has been said that all the subjects of the Queen are bound to take notice of privilege; but so they are of law. Yet is every person competent to decide upon the law? It would follow, according to this mode of reasoning, that all the Queen's subjects are competent to administer law. How, then, are the inferior tribunals to decide, if they could, upon questions of privilege?

There is a saying of Speaker *Onslow* upon this subject, which is to be found in *Hatsell* (a), "That common lawyers, accustomed to the forms and practice of the Courts of Westminster Hall, know little of parliamentary law or of the forms of proceeding in Parliament."

Necessity for
subordination
of Courts.

Either the Courts of Common Law must take their law of privilege from the Parliament, or the Parliament from the Courts of Common Law—it is quite clear they cannot go on co-ordinately, one must be superior and supreme. If the Courts of Common Law are to give the rule, those Courts of Common Law may be contradictory in their decisions. The court for the county of Worcester may decide one way, and the court for the county of Gloucester decide another way, and there may be no possibility of getting those questions removed by a writ of error to the House of Lords. But this extends to criminal proceedings as well as civil proceedings; and in those Courts of Criminal Law, which are guided by the common law, there may be

(a) 2 Hatsell, 75, n.

indictments for false imprisonment, there may be indictments for libel, and then how is uniformity of decision to be had? At one Court of Quarter Sessions, they may decide that the Speaker or officer of the House of Commons is liable to be convicted of a libel, and fined. At another Court of Quarter Sessions they may decide that the privilege does exist that the publication is lawful, and that the indictment cannot be supported.

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What are the two Houses of Parliament to do if they are not to decide themselves: they must be governed by the decisions, and bound by the law as it is declared in every Court of Common Law in which such a question may be agitated. Independently of the uncertainty that would thus be generated, what would be the situation of affairs if an action or an indictment might be brought against the Speaker of the House of Commons, or any officer of the House, for every act that is done by the authority of the House? If the Courts of Common Law have the jurisdiction ascribed to them, then there may be an action for a libel brought against the Speaker of the House of Commons, and against the officers of the House of Commons, at the same time, by twenty different individuals for the same publication, and not only that, but there may be an indictment against the Speaker for a libel,—and libel or no libel would be the question which the Court would have to determine. If the order of the House of Commons is not a bar to a civil action, it would be no answer to an indictment. If the Speaker was indicted for a libel, the truth would be no justification. In a former case, in which Mr. *Stockdale* brought a similar action (a), and where there was a justification of the truth, and where there was a verdict for the defendant upon the justification, if he had adopted another method, and had indicted the Speaker, the truth would have afforded no justification. If the Speaker is so liable to have actions brought against him, and to be indicted, so is the Lord

And of the
Common Law
Courts to the
two Houses.(a) *Stockdale v. Hansard*, 7 C. & P. 731.

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Chancellor, the President of the House of Lords. The Speaker of the House of Commons, or the Lord Chancellor, may find a bench warrant against him on going to preside in the Houses of Parliament, because an indictment is found; and against libel there is no privilege of Parliament. It was once decided by the Courts of Law, that there was, but that privilege was waived, and declared not to exist, by the Houses of Parliament.

If an action
lies in cases of
privilege so do
criminal pro-
ceedings.

A criminal proceeding was preferred in the reign of *James the Second*, when *Sir Robert Sawyer* filed an ex officio information against *Speaker Williams*; and if the law is as it is represented, the Attorney-General might file his information ex officio against the Lord Chancellor or against the Speaker of the House of Commons, if any publication issued from either House which he might judge to be a libel; and upon such an information being filed by the Attorney-General, as the law now stands, there may be an immediate arrest. The power is never exercised, nor has it been by any Attorney-General since the law passed; but there is a power which enables the Attorney-General, on filing an information, to immediately deprive of his liberty the person against whom the information is filed. If it belongs to a private prosecutor, it belongs to the officer of the crown, called the Attorney-General, to prosecute, and if there be any thing published that is disagreeable to him, or those by whom he is employed, immediately it is competent to him to file an information, as it would be competent to *Mr. Stockdale* to go before a grand jury and prefer a bill of indictment; and this indictment may not only be preferred in the Crown Office or at the Central Criminal Court, but in any county in England, where there is a publication by the authority of the House of Commons. The Court will not suppose there is a state of the law that would necessarily and inevitably lead to such consequences. It cannot be supposed that this power, if it exists, will not be exercised. Now is the time for experiment and for innovation. Such an action as this, until *Mr. Stockdale* brought it, has not

been thought of since the time of the Revolution. But his example may possibly be followed; it may be, if this action can be maintained, that the same question may be tried upon an ex officio information by the Attorney-General, or an indictment to be found by grand jury. Then it would be referred to the Court of Quarter Sessions, before whom this indictment might be preferred; and some squire in the county elected to fill the important office of chairman of the quarter sessions, wholly uninitiated in the law, wholly incompetent to decide such a question, would have to direct the jury, upon there being proof that the publication was by the authority of the House of Commons. These consequences, which would inevitably follow, shew that it is utterly impossible that the law can be as contended for by the counsel for the plaintiff. The existence of the two Houses of Parliament is quite incompatible with such a state of the law; more particularly the existence of the House of Commons, which is the popular branch of the legislature. If privilege is denied altogether, then indeed the two Houses are not the exclusive tribunal to determine the question. But if there be such a thing as privilege, it seems to be admitted, by the most decided opponents of it, that Parliament must have exclusive jurisdiction over it. Lord *Brougham*, in the work before cited, states, "the privilege champions, in order to be consistent, must maintain that the Houses of Parliament alone are the judges of their privileges; this right is worth nothing, if it is confined to the judging of the general and abstract question" (a).

The question, therefore, is privilege or no privilege; if there is no privilege, then the House of Commons has no more authority than any debating club or any petty corporation upon such a subject; but if the Houses of Parliament have privilege, then it is conceded that the Houses of Parliament alone can adjudicate upon the existence and extent of these privileges.

Several objections have been made to the exclusive juris-

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(a) 4 Lord Brougham's Speeches, p. 347.

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diction of the two Houses of Parliament in matters of privilege. One is, that it would be giving a legislative power to each House, independent of the other, and of the crown. No such power is ascribed to either House. The Houses of Parliament, like various courts in this country, are courts of exclusive jurisdiction. The Ecclesiastical Court, the Admiralty Court, the Revenue Court of Exchequer, and other courts, in which is vested an exclusive jurisdiction over a particular branch of the law, have not the power to make the law, but only a power to declare the law. The House of Commons cannot give to itself a new privilege, any more than the Court of Admiralty could extend its jurisdiction, or alter the law of the land. But the questions, that are properly cognizable in the Court of Admiralty, this Court will not take cognizance of here. If an action for false imprisonment were brought by a person who was on board a captured vessel, and it turned out that the imprisonment arose from the capture as prize, this Court would not even, in an action for this personal wrong, take cognizance of the question, whether the capture was lawful or unlawful. So with respect to the Ecclesiastical Court, its judgment upon a question of marriage is binding; a judgment of the Court of Exchequer *in rem*, upon a question of forfeiture, is binding, because it is the judgment of a court of peculiar jurisdiction, to whom it is given by the constitution of the country to determine those questions. It might just as well be said that the Courts of Common Law have a legislative authority by administering the common law. This Court has a jurisdiction over all questions of common law, civil and criminal. Much has been said of "judge-made law," and there is a great deal of our best law that may be so described. *Pemberton* said, in the reign of *Charles* the Second, that he himself, in his time, had made more law than King, Lords and Commons; but that is, properly speaking, not making law; it is merely declaring the law. This law is supposed always to have existed, and merely to be declared by the judges. But although the

judges of the common law have no legislative authority, it may be said that by declaring the law they have a power to alter the law of the land.

As it has been convenient to assign particular branches of the law to particular tribunals,—the Common Law to the Courts of Common Law,—Equity, to the Courts of Equity,—International Law to the Court of Admiralty,—Canon Law to the Ecclesiastical Courts: *pari ratione*, Parliamentary Law has been assigned for its administration to the two Houses of Parliament; and it was essentially necessary, with regard to Parliamentary Law, that this distribution should take place, because to prevent collision it is quite clear that either the Courts of Law must be subordinate to the two Houses of Parliament, or the two Houses of Parliament must be subordinate to the Courts of Law.

The next objection is, the liability to abuse which would arise if such a power were to be acknowledged to exist in the two Houses of Parliament.

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Liability to
abuse not a le-
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ment.

This is not a legitimate argument. It cannot possibly be argued from the possibility of abuse, that the power does not exist. In every balanced government—wherever there is not a pure despotism—there must be various powers in the state to check each other, each of them having certain limits, and to be only exercised properly within those limits, but for the abuse of which powers it is utterly impossible by law to provide any remedy; so that it is altogether a false maxim that no power can exist, for the abuse of which there is not a legal remedy.

In England, where there is a limited monarchy, there are certain prerogatives belonging to the crown. There is the prerogative of making peace and war,—the prerogative of pardoning offences,—the prerogative of assembling, and proroguing, and dissolving Parliament. For the abuse of each of these powers, so far as the sovereign is personally concerned, the law provides no remedy; but for the public safety, and for the due administration of justice, these

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powers are conferred upon the sovereign, in the confidence that they will be exercised wisely and discreetly. And yet, it may be said, the sovereign may make war wantonly with all the world, or the sovereign may pardon all criminals, and create an entire impunity for crime; or the sovereign may assemble and dissolve Parliament from mere caprice, and render the best labours of the legislature utterly fruitless.

Power of H.
of Lords may
be abused;

The House of Lords have certain high powers allotted to them by the constitution; amongst others, the power of judicature in the last resort; and where they are not parties—which they would often be in questions of privilege, if questions of privilege were to be entertained as questions in the Courts of Common Law, and brought before the House of Lords—where they are not parties, that power of judicature is wisely and usefully awarded to them. But they *may* abuse it, and there is no remedy for it. They have it in their power to alter the law of the land. They might repeal an act of parliament. They might decide that the second son should inherit instead of the eldest son: and how could such a decision be reversed? What remedy would be open to the party who had been injured? Suppose for some trifling contempt, such as bringing an action against the door-keeper of the House for the value of an umbrella, they were to impose an enormous fine—100,000*l.*—and sentence the party to twenty years' imprisonment, what redress could he obtain in the Courts of Law?

or of H. of
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There are certain powers assigned exclusively to the House of Commons, more particularly that of voting the public money. But, it may be said, they may stop the supplies, not only when there is a public grievance, when the ministers of the crown are acting tyrannically, when the crown will not dismiss ministers that have lost the confidence of both Houses of Parliament, and are odious to the people, but the House of Commons may stop the supplies when the government is wisely and constitutionally administered, for the purpose of defrauding the public creditor. So they

have the acknowledged and undoubted power of committing parties for contempt. They may abuse this power also, and there is no constitutional remedy for the abuse.

The same argument might be used with regard to the powers of various officers under the crown. Her Majesty's Attorney-General may enter a nolle prosequi upon any indictment. It might be said, shall such a power be given to an officer under the crown, by which the administration of justice may be impeded and stopped? It is a power that usefully belongs to this office for the public benefit, but it is liable to abuse. Again, a writ of error cannot be brought without the fiat of the Attorney-General, and it may be said that innocence thus has no protection, because it may depend upon the caprice of an officer of the crown whether an erroneous judgment, by which a person has been improperly convicted, may be reversed. So again, the Attorney-General's power of filing criminal informations is one which is undoubtedly capable of much abuse, but it is a power which as undoubtedly does exist.

So as to what may be done by parliament itself, the three branches of the legislature concurring. By the constitution of America, congress has limited power. By the constitution of England, parliament has unlimited power. There might therefore be an act of parliament to change the religion of the country against the wishes of the people, or for making the parliament last during a king's life, or for abolishing the House of Commons, or for introducing a pure despotism into this country, or (if any thing so monstrous can be supposed) for putting to death all children under three years of age. What is to be done upon such occasions? Resistance is the only remedy—revolution has begun—the law has provided no remedy—society is dissolved. The constitution must be reconstructed.

The same argument, if it may be so termed, derived from the liability of power to be abused, may equally be applied to the Courts of Law themselves. These Courts may abuse their powers—they may alter the law, and make new laws

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under pretence of declaring the old law. The Courts of Law, for instance, might decide that a member of parliament was liable to be arrested for debt during the sitting of parliament, or that the House of Commons had no power to commit a party for prevarication, or for obstructing the members, or for a contempt committed in the face of the House. Undoubtedly a Court of Law might so abuse its powers. If the Courts of Law have the power of determining upon privilege, there is the same possibility of abuse of power as if it were vested in the House of Commons.


It may be acknowledged that privilege has been abused. In a long course of ages, it is not difficult to shew that power may have been abused; and so the prerogatives of the crown have been abused, and courts of justice have abused the power conferred upon them; but that is no argument to shew that those powers do not exist. The question is, what is the remedy for the abuse, and whether the proposed remedy is at all consistent with the object which is in view in creating the power. It seems, however, to be supposed that the House of Commons consists of persons who will do nothing but convert the law to their own private advantage for the purposes of corruption or faction, and that the judges are pure intelligences, who will independently and unerringly declare the law, and consult nothing but the cause of truth and justice. The constitution supposes that the House of Commons consists of upright and intelligent men, possessing the confidence of their constituents, who will justly exercise the functions which the constitution assigns to them.

Instances of
misconduct in
judges.

It may be useful to refer to the conduct of the judges in a few instances, and consider what would have been the consequences, if questions of privilege had been referred to their determination. In a speech of Mr. *St. John (a)*, on the question of ship-money, he says, "Sir *Francis Wayland*, Chief Justice of the Common Pleas in the time of *Edward the First*, was attainted of felony for taking bribes, and his

(a) 3 How. Sta. Tr. 1273.

lands and goods forfeited, as appears in the Pleas of Parliament, 18 *Edw.* 1, and he was banished the kingdom as unworthy to live in that state against which he had so much offended. Sir *William Thorpe*, Chief Justice of the King's Bench in *Edward* the Third's time, having of five persons received five several bribes, which in all amounted to 100*l.*, was for this alone adjudged to be hanged, and all his lands and goods forfeited."

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In the great case of ship-money, the judges held that there was a power of taxation in the crown, that the crown might raise money from the subject under the pretence that it was necessary to equip ships, and that the necessity for that was to be judged of by the crown alone—the application of the money also being left to the crown(*a*).

In *The King v. Darnel* (*b*), the judges held that, where there was a commitment by the King in Council, there was no habeas corpus; a decision whereby lettres de cachet would have been established in this country, if it had not been reversed by parliament.

The answers of *Tresilian* C. J., *Belknap* C. J., and other judges to *Richard* 2, to be found in 1 Parl. Hist. 194, are remarkable instances of the judges of those days lending themselves to the crown to destroy privilege. Is it to be supposed that, by the constitution, it belonged to such judges to decide on privilege of parliament? *Tresilian* was himself executed as a traitor. The contriver of death for others, he perished by his own art. *Belknap*, likewise, was convicted, but escaped to Ireland. Succeeding judges have shewn an equal disregard of the liberties of the people, and of the law of the land.

Another example of the opinions of judges respecting privilege may be given that occurred in the year 1629. There being an attempt in parliament to inquire into some of the tyrannical acts of *Charles* and his ministers, *Selden* wished a question for that purpose to be put by the Speaker

(*a*) *Rex v. Hampden*, 3 How. Sta. Tri. 825.

(*b*) 3 How. Sta. Tri. 1.

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from the chair. The Speaker refused to put the question, stating as his excuse, "that he was otherwise commanded by the king (a)."


That parliament was immediately afterwards dissolved. After the dissolution, *Selden*, *Stroud*, and other members were prosecuted in the Star Chamber for matters done by them in parliament. *Heath* was then attorney-general. *Heath* was afterwards impeached for having prosecuted these five members for what they had done in parliament, thereby acknowledging that, even at that time of day, such a proceeding was unconstitutional and unlawful. But it is stated, that "the king, purposing to proceed against the members of the House of Commons, who were committed to prison by him in the Star Chamber, caused certain questions to be proposed to the judges upon the 25th of April. Whereupon all the judges met at Serjeants' Inn by command from his majesty, where Mr. Attorney proposed certain questions concerning the offences of some of the parliament men committed to the Tower and other prisons; at which time one question was proposed and resolved, viz. that the statute of 4th *Hen.* 8, intituled, 'An Act concerning *Richard Strode*,' was a particular act of parliament, and extended only to *Richard Strode*, and to those persons who had joined with him." That act of parliament has been held repeatedly to be a general law, and to forbid calling in question any member of parliament. But the judges of that day held that it was merely a particular law, and did not at all prevent the prosecution in the Star Chamber of those members for what they had done in the House of Commons.

Then another question put by Mr. Attorney at the command of the king to the judges was; "whether a parliament man committing an offence against the king or council, not in a parliament way, might, after the parliament ended, be punished or not?" Now when was an offence, committed in the House of Commons, said to be not in a parliament

(a) 3 How. Sta. Tri. 235 et seq.

way? When a speech was made disagreeable to the king or the minister. "All the judges unâ voce answered, he might, if he be not punished for it in parliament, for the parliament shall not give privilege to any contra morem parliamentarium, to exceed the bounds and limits of his place and duty; and all agreed that regularly he cannot be compelled out of parliament to answer things done in parliament, in a parliamentary course: but it is otherwise when things are done exorbitantly, for those are not the acts of a court."

Another question was this, "whether if one parliament man alone shall resolve, or two or three shall covertly conspire to raise false slanders and rumours against the lords of the council and judges, not with intent to question them in a legal course or in a parliamentary way, but to blast them and to bring them to hatred of the people, and the government in contempt, they be punishable in the Star Chamber after the parliament is ended?—*Answer.* The judges resolve, that the same was punishable out of parliament, as an offence exorbitant committed in parliament beyond the office and besides the duty of a parliament man." In "*Nelson's Collections*"(a) there is an account varying a little from this of the questions and answers. The members were imprisoned on this extra-judicial opinion of their lordships. A habeas corpus was moved by *Stroud* and the others, and upon the habeas corpus being sued out in the Easter term of 5 *Charles* 1, it was returned that *Stroud* was in custody by virtue of a warrant signed by twelve lords of the king's council, and also by a warrant under his majesty's hand. And afterwards, when the judges were to have given judgment, the king wrote to the justices, stating, that he had removed the prisoners to the Tower, whereupon the Court would not deliver any judgment; and afterwards, when the prisoners were brought up and tendered bail, the Court refused to accept it, unless they also gave sureties for good behaviour. The prisoners "were remanded to prison because they would not find

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(a) 2 Nals. Coll. 374, Cit. 3 How. St. Tr. 238, n.

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sureties for their good behaviour." Therefore the judges remanded to prison the members of the House of Commons, because they would not give sureties for their good behaviour in respect of the motion they had made or supported in their place in parliament; and these are the judges to whom it is supposed that the province of determining matters of privilege is by the constitution assigned.

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So again, in the time of *James 1*, there was a contest as to whether the privileges of the House of Commons were granted of grace and favour by the king, or were held as of right. The king insisted that he granted them as of grace and favour, and might withhold them if he pleased. The House of Commons made a protest against this doctrine, which was entered in the Journals. When parliament was dissolved, the king ordered the Journals of the House of Commons to be brought before him, and *in the presence of the judges*, and no doubt at their suggestion, this protest was erased from the Journals of the House of Commons by the king's own hand (*a*).

To shew again what may be expected from the judges they laid down in *Sir Edward Hales's* case(*b*), with one voice, that the king had the dispensing power. Chief Justice *Herbert*—who was the same individual that decided the *King v. Williams*, and who had prosecuted the five members, and who himself had been impeached for that tyrannical proceeding—after a consultation with the twelve judges, said, "We were satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare the opinion of the Court to be, that the king may dispense in these cases and go upon these grounds. 1. That the kings of England are sovereign princes. 2. That the laws of England are the king's laws. 3. That, therefore, it is an inseparable prerogative in the kings of England to dispense with penal laws in particular cases, and upon particular necessary reasons. 4. That

(*a*) See 1 Parl. Hist. 1361-3.

(*b*) 11 How. Sta. Tri. 1198; 2 Shower, 475; Cumberbach, 21.

of those reasons and those necessities the king himself is the sole judge."

Such was the misconduct of the judges in the times in which privilege was settled, that *Clarendon* himself, no enemy to monarchy, and no enemy to the judges, says of the conduct of the latter, that "when the people saw in a Court of Law, (that law that gave them title to the possession of all that they had,) reasons of state urged as elements of law, judges as sharp-sighted as secretaries of state, and in the mysteries of state; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof; they had no reason to hope that doctrine, or the promoters of it, would be contained within any bounds" * * * (a).

These instances are a strong set-off against the abuses of privilege by either House of Parliament, and shew that to the judges it would have been impossible to have referred the determination of questions of privilege, without the constitution being entirely subverted. But, generally speaking, the law will presume, and rightly presume, that the judges will do their duty; so also with equal propriety will the law presume, that the House of Commons will do their duty.

The true remedy for abuses of privilege is to be found in the constitution itself, without any reference to Courts of Law, or any interference by inferior tribunals. There may be a petition to either House by a party grieved, where he will be heard by himself, his counsel, or agent, and may call witnesses in support of his petition. There may be a revision of that which has been done by either House. There may be a conference between the two Houses. With regard to the House of Commons there may always be a dissolution of parliament, and an appeal to the people. Where there has been an usurpation of power on the part of the House of Commons which does not belong to it, that has been found an effectual remedy. In *Wilkes's*

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(a) 1 Clar. Hist. Reb. 123 (ed. 1826).

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case (a), the House of Commons held that a member expelled from the House was disqualified from being re-elected. That was an abuse of privilege; but what was the correction of it? Not an appeal to a Court of Law, but an appeal to public opinion; and a House of Commons was afterwards returned, by whom that resolution was reversed.

With regard to any individual loss or injury, from any proceeding of the House, there may be compensation awarded, and there are various cases where, upon petition to the House of Commons, compensation has been awarded, and a remedy has been afforded.

The interference of Courts of Law to correct abuses of privilege is wholly unnecessary. It never has been put in practice. In all the various instances in which it may be said that either House has abused its privileges, there is not in all the annals of the administration of the law in this country one single instance of such an excess or abuse being corrected or remedied, or checked by the interference of a Court of Law. Since Admiral *Griffin's* case, which occurred about the year 1759 or 1760, down to the present time, no complaint has been made; and there has been a constant study to accommodate the exercise of privilege to public opinion.

Readiness of
House of
Commons to
afford remedy.

At common law, if a member of parliament, being in execution for a debt, was discharged, the debt was extinguished, and the creditor had no remedy. That was a grievance to the subject. How was it corrected? By an act of parliament, not by a suit at law. The 1 Jac. 1, c. 13, was passed, by the second section of which a party who had sued out execution might, after the end of the session of parliament, and when the privilege had ceased, sue out a new writ of execution. Here parliament itself administers a remedy for the grievance complained of. The third sec-

(a) Resolutions in *Wilkes' case*, A.D. 1769. Afterwards reversed, A.D. 1783.

tion of that act of parliament is a parliamentary recognition of the power of the two Houses to judge of their own privileges, and to punish without the power of review. It provides, "that this act, or anything herein contained, shall not extend to the diminishing of any punishment to be hereafter by censure in parliament inflicted upon any person which hereafter shall make, or procure to be made, any such arrest as is aforesaid." Cautiously, therefore, reserving to the two Houses of Parliament the right, which, by the constitution of the country, they enjoy, by their censure in parliament, to punish any person for a breach of privilege.

By the 12th and 13th of *Will. 3*, c. 3, s. 1, permission is given to any person to commence and prosecute any action or suit in the superior Courts against any member of either House, or against their servants, immediately after the dissolution or prorogation of any parliament, until a new parliament, or the same, be re-assembled, and immediately after any adjournment for more than the space of 14 days. This again removed a grievance that was complained of, that, even when parliament was not sitting, neither members nor their servants could be sued, and it shews that till then that privilege had existed.

By the 11th of *Geo. 2*, c. 24, this act is extended to all Courts of Record in England and Ireland; and by the 10th *Geo. 3*, c. 50, it is enacted, that any action or suit may at any time be brought against any peer or member of parliament, or their servants. The statute of *William 3*. only allowed suits to be brought at a certain distance of time after the dissolution or prorogation. But by the 10th of *Geo. 3*, "any action or suit may at any time be brought against any peer or against any of the knights, citizens, and burgesses, and the commissioners for shires and burghs of the House of Commons of Great Britain for the time being, or against their menial or any other servants." By sect. 2, there is an express provision that the persons of members are not to be arrested or imprisoned; but as

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there is no such provision in favour of their servants, the effect of the act was to take away from such servants the privilege they had before enjoyed of freedom from arrest.

By the 4 *Geo. 3*, c. 33, which has been repeatedly renewed and introduced into every Bankrupt Act since, any trader having privilege of parliament, if he does not pay or satisfy a legal debt to the amount of 100*l.* within two months after having been served with legal process, may be made a bankrupt. Before that statute this difficulty occurred, that, as a member of parliament could not be arrested, there could be no act of bankruptcy by his lying in prison, and therefore, although a trader and insolvent, his creditors were without means of getting an equal distribution of his effects.

So also in the case of Mr. *Long Wellesley* (a), where, upon a committee of privileges being appointed, they held and reported that he was not entitled to privilege of parliament, he being guilty of contempt in the Court of Chancery of the authority of the presiding judge of that Court. And in the more recent case of Mr. *Lechmere Charlton* (b), where that gentleman, having written a letter to a master of the Court of Chancery, which Lord *Cottenham* C. held was a contempt, and being ordered to be committed, addressed himself to the Speaker and claimed privilege, a committee was appointed by the House of Commons to consider his claim, and the committee decided unanimously that the claim was unfounded. Things have continued in this quiet and settled state, without any appeal to the law, and without any grievance unredressed by the Houses of Parliament, down to the time when Mr. *Stockdale* brings his actions.

But it is said, why not submit the privileges of parliament to the decision of the Courts of Common Law, as well as the prerogatives of the crown? For obvious reasons.

(a) 2 *Russ. & Myl.* 639; 4 *Lord Brougham's Speeches*, 357.

(b) 2 *Myl. & Craig*, 316.

In the first place, anything done by an officer of the crown, in the exercise of the prerogative, is done according to the common law, and the Courts of Common Law are competent to determine upon it. Prerogative is well defined; it is part of the common law, of which the judges are cognizant. There is no other tribunal before which such a question can be agitated and decided. There is no danger at all to the liberties of the subject from such a course being pursued, and such a course, therefore, has been pursued without any mischief or inconvenience. There is no danger to the crown, for the judges are appointed by the crown, and its power is permanent. But that is totally different from the question of privilege, which depends on a law *sui generis*, the administration of which is necessarily committed to a peculiar tribunal. It is observable also, that against any exercise of power on the part of the crown, analogous to that which is now called in question, there would be no remedy at law. Suppose that a proclamation were issued by the crown, offering a reward for the apprehension of an individual by name, on the charge of treason, or murder, or any other crime, could it be contended for a moment that an action or an indictment would be sustainable against the printer of such proclamation? What then is to be done, supposing that something very outrageous should be committed by either House of Parliament? Suppose there were an injunction from the House of Commons against proceeding in an ejection, or a warrant from the Speaker to put a man to death for an alleged breach of privilege in suing a member for a debt. What is to be done in such a case? The answer is, that it is not decent, and it is not to be permitted to make such a supposition. It might as well be said, what is to be done if the sovereign should personally commit some great crime? Or what is to be done if the judges of the Courts of Law grossly pervert their powers?

It was well said by *Finch*, afterwards Lord Nottingham, in the great case of Monopolies, *The East India Company*

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v. *Sandys* (a), "I take it the possibility of the abuse of power is no objection against that power. For by this argument, though the King has a power and prerogative by law to restrain subjects from going beyond the sea, by a *Ne exeat regnum*; 'No,' say they, 'he cannot; for then he may restrain all his subjects from going out of the kingdom, and so imprison and hinder every one from going out of the nation.' * * * So that this way of arguing does strike at all power, and I need give no other reason for it; for there can be no power at all which is not accompanied by some trust; and there is no trust but it possibly (morally speaking) may be broken."

There is also a striking passage in *Yorke's Law of Forfeiture* (b) upon this possibility of abuse. He says, "The law will not suppose the possibility of wrong, since it cannot mark out or assist the remedy; yet every member of that representative body might exclaim in the words of Crassus, the Roman orator, when he opposed the encroachments of a tyrannical consul, on the authority of the Senate, 'Ille non consul est, cui ipse senator non sum'—he is no king, to whom we are not a house of parliament. On the other hand, should the representative of the Commons, like that of Denmark, surrender the rights and liberties of the people into the hands of the King, and the King, instead of dissolving the Parliament, should accept the surrender, and attempt to maintain it, contrary to the laws and to the oath of the Crown: or should the two Houses take the power of the militia, the nomination of privy councillors, and the negative in passing laws, out of the Crown, these would be cases tending to dissolution; that is, they are cases which the law will not put, being incapable of distrusting those whom it has invested with the supreme power, or its own perpetual duration; and they are out of the reach of laws and stated remedies, because they render the exercise of them precarious and impracticable. This observation may be

(a) 10 How. Sta. Tri. 407.

(b) *Considerations on the Law of Forfeiture for High Treason*, 108, 2d ed.

applied to every similar case which can be formed in imagination relative to the several estates ; with this difference, that it holds strongest as to the King, in whom both the common and statute laws have reposed the whole executive power ; nor could the least branch of it be lodged in the two Houses, for the purpose of providing a judicial remedy against him, unless the constitution had erected imperium in imperio, and were inconsistent and destructive of itself. Should it then be asked, What ! has the law provided no remedy in respect of the King ? and is the political capacity thus to furnish an exemption to him in his natural, from being called to account ? The law will make no answer, but history will give one. When the King invaded the fundamental constitution of the realm, the Convention of Estates declared an abdication, and the throne vacant. Indeed the political character, or the King considered as an estate, still subsisted in notion and judgment of law ; the right of the people to be governed by a limited monarch, according to the ancient exercise and distribution of powers between the three estates, remained as much as ever ; but the exercise of the government was suspended, which made it a case tending to dissolution."

That is the proper answer to be given to such questions. They are not reasonably or properly to be put, and if they are put, the answer is that such usurpation of power tends to a dissolution of society. In such a case revolution has begun, and resistance to power ceases to be rebellion. But, wherever there is paramount power, there is some possibility of abuse, and paramount power must subsist somewhere. In a pure despotism, it is in the sovereign. In a limited monarchy the power is distributed in various departments of the State, but in each department it is without any legal control. The law provides no remedy. The law supposes that that power which is created for the public good will be constitutionally and beneficially exercised.

But if it were necessary, a clear distinction may be drawn between this order of the House of Commons, authorizing a

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publication of its proceedings, and such an order as has been referred to, namely, a warrant for the execution of a prisoner. The order now under discussion is within the general jurisdiction of the House of Commons. The other would not be, and might therefore be considered as illegal and void. There is therefore no resemblance between such outrages as have been referred to, and an act within the general jurisdiction of the House of Commons, which has been done by the unanimous consent of the House, and which has been sanctioned and approved of, and adhered to, by men of every party and class in the present House of Commons. It is submitted therefore that the first point is made out, and that, as it appears on the record that the question of privilege arises directly, this Court has no jurisdiction.

II. Even if the question arises *incidentally*, still upon the record there must be judgment for the defendants. The resolution of the House of Commons, (31 May, 1837,) admitted on the record, amounts to an adjudication, by a Court of exclusive jurisdiction and therefore Courts of Law are bound by it. There is neither traverse, nor confession and avoidance, but there is a simple demurrer, admitting this adjudication on the part of the House of Commons, respecting the law of Parliament. It is quite clear that such a privilege may exist. The Court cannot take upon themselves, *à priori*, to say that there is no such power vested in the House of Commons. There is nothing absurd in it. Then, how can the Court, sitting here upon a demurrer, say that it does not exist? What organs have the Court to discover whether or not the adjudication of the House of Commons be correct? If the plaintiff meant to deny its existence, he ought to have replied, instead of demurring. Merely looking to the record, this power may have been exercised in a thousand instances. It may go back to the time when printing was first invented, for any thing that the Court can know, merely looking to the record; and it may have been a substitute for another mode of publishing to the community that existed before

the invention of printing. For any thing that the Court can tell, looking at the record,—before the separation of the two Houses of Parliament, there may have been a constant, unquestioned power exercised of communicating to the public all the proceedings of Parliament, which Parliament thought it was for the public good should be communicated. This power may have been exercised by the Wittenagemote. It is asserted that this is the law of Parliament. How can the Court find out that this is not so, and has not always been so? Is it upon a demurrer in law that this Court is to look to see whether this be the fact? This is not at all like a declaration of the House of Commons upon a question of common law unconnected with privilege. Such declarations are certainly to be disregarded. If the House of Commons were to do, what the House of Commons has formerly done, namely, to come to a resolution respecting general warrants, by a Secretary of State, or any question of common law, the Court would not notice such resolution. But this is not a resolution respecting common law, but respecting parliamentary privilege.

There are various instances in which general certificates or findings of the law are regarded as authoritative declarations of the law. There are numerous resolutions of the judges in Lord Coke's Reports, which are always considered as evidence of the law, and in any court in which the laws of England would be considered as a foreign law, any resolution of the Judges authoritatively promulgated would be considered as clear evidence of the law. When a custom of trade has been found by a jury, judicial notice is to be taken of it. When the Recorder of London has certified the customs of London, his certificate is received as proof of these customs in all succeeding times. Why is not the Court to give this adjudication of a House of Parliament the effect that would be due even to an adjudication or decision of an Ecclesiastical Court, or the Court of Admiralty, or the Court of Exchequer, or any other Court of peculiar jurisdiction?

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This may even be considered as a question of foreign law. If a similar action were brought in Scotland before the Court of Session, or the Sheriff's Court, and there were pleaded in justification an order of the House of Commons, that would raise a question of foreign law, which the Scottish Courts would have to determine. So when the same question arises in the Courts of Common Law in England, this question of parliamentary privilege is equally to be considered as a question of foreign law and the court deciding incidentally a question of foreign law, or a question that belongs to another tribunal, is always bound (and for that there are many authorities) to follow the law of the court of original jurisdiction. Suppose an action were brought by a member of parliament, who had been arrested upon an indictment for a libel, for being improperly arrested, contrary to privilege, and that this action being brought by him against the prosecutor, the prosecutor should plead that he had a right to arrest him, and should set out the indictment for the libel, and shew that the indictment was found, and should go on to allege, that against prosecution for libel there is no parliamentary privilege, and should then vouch the resolutions of both Houses of Parliament upon that subject, and that there should be a demurrer to the plea, the Court before whom the demurrer was argued would be bound upon this question of privilege, which would arise in that instance incidentally, to take the law as so found and declared by the two Houses of Parliament. So here it is averred upon the record, that such is the law of Parliament, and that there has been this adjudication, and this is admitted upon the record, and if the Court had jurisdiction over the question incidentally, still the Court is bound by the adjudication so pleaded and so admitted.

The authorities fully bear out the foregoing propositions. To begin with a class which proves that the law of parliamentary privilege is distinct and separate from the common law of England, and therefore is not a law which this Court is to administer, but that it is left to another tribunal.

The first authority upon this point is to be gathered from what occurred in the reign of *Richard 2*, after the decision of *Tresilian* and *Belknap*, and their companions, on parliamentary privilege (a). When those judges came to be tried themselves upon an impeachment, a question arose respecting the mode of proceeding, and it was objected that this impeachment against them for their misconduct was not according to the common law. In 1 Parl. Hist. 207, an account will be found of what there took place. There it is declared that the law of Parliament is a peculiar law, and that it is for the Houses of Parliament to judge of that law. In the earliest instance, therefore, to be found in our records, both propositions are established, that the law of Parliament is a peculiar law, and that it belongs to the Houses of Parliament alone to administer it. There is a legislative declaration of the same doctrine by King, Lords, and Commons, in an act of parliament of the same reign, the 11 Ric. 2, not printed with the statutes, but appearing on the Parliament Rolls and clearly an act of parliament:—

“The Lords Spiritual and Temporal then present claimed, as their liberty and franchise, that the great matters moved in this Parliament, or to be moved in any future Parliament, touching Peers of the land, should be discussed and judged by the course of Parliament, and not by the civil or common law of the land used in the other lower courts of the kingdom: which claim, liberty and franchise, the King in full Parliament readily allowed and granted. *Le Roi le voet.*” (b)

Invariably the judges have refused, either when consulted by the House of Lords, or when questions have occurred in their own courts, to decide upon matters of privilege. The earliest instance upon the subject is one which occurred in the 27 Hen. 6, and of which an account is to be found in 1S Rep. 63, and which is cited in Sir Robert Atkyns’s argument in *Rex v. Williams*. Lord Coke says, “The privilege, order, or custom of Parliament,

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(a) 1 Parl. Hist. 207.

Atk. Pow. Parl. 108, and 14 East,

(b) 3 Rot. Parl.. 244. (Cited 22.)

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either of the Upper House, or of the House of Commons, belongs to the determination only of the Court of Parliament." In the 27th year of King *Henry 6*, there was a controversy moved in the Upper House between the Earls of *Arundel* and *Devonshire*, "for their seats, places, and pre-eminence of the same, to be had in the King's presence, as well in the High Court of Parliament as in his Councils and elsewhere; the King, by the advice of the Lords Spiritual and Temporal, committed the same to certain Lords of Parliament, who for that they had no leisure to examine the same, it pleased the King, by the advice of the Lords at his Parliament, anno 27th of his reign, that the Judges of the land should hear, see and examine the title, &c., and to report what they conceive herein. The judges made report as followeth: That this matter, namely, of honour and precedence between the two earls, Lords of Parliament, was a matter of Parliament, and belongs to the King's Highness and the Lords Spiritual and Temporal in Parliament, by them to be decided and determined." Sir *Robert Atkyns*, commenting on this case, observes, "One would think this were a strange answer of the judges to deny their advice. Were they not assistants to the Lords in matters of law? The true reason of their declining to give their advice is, it was a case above them, and not to be determined by the ordinary rules of law, and therefore out of their element"(a).

Thorp's case.

Then comes *Thorp's case* (b), which, it is said, is not to be relied upon; it is difficult to see for what reason, because at the time it arose there was profound peace in the country. There was a Parliament sitting; and if the judges were subject to any influence, or had any bias on their minds, they would have been inclined to give a direct opinion against the privilege then in controversy to please the Duke of *York*, who was then lord of the ascendant, and eager to crush an enemy of his house. The

(a) 13 How. St. Tr. 1427.

Writs, 678; Hakewell. 125; Atk.

(b) 13 Rep. 63; 4 Inst. 15; 5

Pow. Parl. 107; 1 Hatsell, 29;

Rot. Parl. 227—239; 4 Prynne's

14 East, 25.

opinion expressed by *Fortescue* C. J., in the name of all the judges, must be considered their deliberate and calm and solemn judgment. Now *Thorp*, who was a baron of the Exchequer, and Speaker of the House of Commons, and a strong Lancastrian, had been sued by the Duke of York, father of *Edward* 4, in respect of his having taken some harness or military accoutrements at York. The action was in the Exchequer: there was a judgment against him, and he was imprisoned in the Fleet during the recess of parliament, he being then Speaker of the House of Commons. When the Parliament met, they were without a Speaker, and they referred the matter to the House of Lords; they had what may be considered a conference with the Upper House, to deliberate respecting the mode of proceeding in this emergency, and upon that occasion the judges were summoned to give their opinion whether the privilege of Parliament extended to such a case. The Speaker being in prison for damages recovered against him, during the recess of the Parliament, the judges were asked whether, when Parliament met again, he was entitled to be discharged from that imprisonment? "The said Lords Spiritual and Temporal, not intending to impeach or hurt the liberties and privileges of them that were coming for the commune of this land to this present Parliament, but legally after the course of law to administer justice, and to have knowledge what the law will weigh in that behalf, opened and declared to the justices the premises, and asked of them whether the said *Thomas* ought to be delivered from prison, by force and virtue of the privilege of Parliament, or no." The question of privilege was directly submitted to them, and this was their answer: "To the whole question, the Chief Justice, in the name of all the justices, after sad communication and mature deliberation had amongst them, answered and said: That they ought not to answer to that question; for it hath not been used aforetime that the justices should in anywise determine the privileges of this

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High Court of Parliament ; for it is so high and so mighty in its nature, that it may make law, and that, *that* is law, it may make no law ; and the determination and knowledge of that privilege belongeth to the Lords of the Parliament, and not to the justices." It has been suggested that this was merely saying that they were not to determine and decide. That is not a just interpretation of the language of the Chief Justice : it never was for a moment supposed that it was referred to them to adjudicate, but only to give an opinion to their lordships, and that opinion the judges respectfully refused to give. That is the interpretation that is put upon it by Lord *Ellenborough* in *Burdett v. Abbot* (a), where his lordship says, " Surely the word ' determine ' was not there meant to be used by them in the sense of ' adjudge,' but they meant to say no more than this : you, the Lords' House, ask our opinion upon a question concerning the privilege of Parliament before you, but we are not to determine that question ; that is, we are not to give you any determinate purpose upon that subject. The question was not addressed to them as to persons who were to determine or adjudge upon it, but as advisers to the Lords on the law. They say in effect, it is not a proper subject for us to enter into ; it properly belongs to yourselves ; and therefore it is not for us to advise you upon it."

Ferrers' case.

The next case upon the subject is *Ferrers'*, 1 Hatsell, 53(b). *Ferrers* was elected member for Plymouth. In going to the Parliament House he was arrested in London by a process out of the King's Bench, at the suit of one *White*, for the sum of 200 marks, upon a judgment against him as a surety for the debt of *Waldon*. The arrest being made known to the Speaker of the House, the Serjeant was ordered to go to the Compter, in Bread-street, where *Ferrers* was, and there to demand delivery of the prisoner.

(a) 14 East, 29.

of Courts, 8 Dyer, 275 ; 14 East,

(b) Cited 1 Holinshed, 955.

40 ; Wynne's Jur. H. C. 8.

See also Crompton's Jurisdiction

The city officers resisted the Serjeant, and an affray ensued, and the Serjeant was obliged to defend himself, and his mace was broken. The sheriffs came to the Compter, but they took part with the officers, and the Serjeant was obliged to go without his prisoner. The House being informed of this, there was a conference between them and the Lords, and the Lords thought it was a great contempt, but referred the punishment of it to the Commons, whereupon the Serjeant was ordered to go to the Compter and demand the prisoner, without writ or warrant. The Commons refused a writ of privilege, for there was an offer to discharge *Ferrers* upon a writ of privilege; but the Commons insisted that they had a right to discharge him by their own authority; that is, by the mace, without any writ of privilege. Accordingly the prisoner was delivered up to the Serjeant, and then the sheriffs and the officers of the Compter were summoned before the House; and in the conclusion, the sheriffs and *White* were committed to the Tower, and the other inferior officers to other places, where they remained till discharged on their petition and submission; and an act of parliament was passed to revive the execution against *Waldon*, the principal debtor, and to discharge *Ferrers*.

Henry 8 said upon that occasion: "And further, we be informed by our judges, that we at no time stand so highly in our estate royal as in the time of Parliament, wherein we as head, and you as members, are conjoined and knit together into one body politic, so as whatsoever offence or injury during that time is offered to the meanest member of the House, is to be judged as done against our person and the whole Court of Parliament, which prerogative of the Court is so great (as our learned counsel informeth us), as all acts and processes coming out of any other inferior courts must for the time cease and give place to the highest." The account goes on to say, "whereupon Sir *Edward Montagu*, then lord chief justice, very gravely declared his opinion, confirming by divers reasons all that the King had

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said, which was assented unto by all the residue speaking to the contrary" (a).

There are various other authorities to the same effect. Lord Coke, in 4th Inst. 15, writes thus: "And every court of justice hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, &c., so the High Court of Parliament *suis propriis legibus et consuetudinibus*. It is *lex et consuetudo parliamenti*, that all weighty matters in any parliament moved, concerning the Peers of the Realm or Commons, in Parliament assembled, ought to be determined, adjudged, and discussed by the course of the parliament, and not by the civil law, nor yet by the common law of this realm used in more inferior courts, which is declared to be *secundum legem et consuetudinem parliamenti* concerning the peers of the realm, by the King and the Lords spiritual and temporal, and the like, *pari ratione* for the Commons, for any thing moved or done in the House of Commons; and the rather, for that, by the law and custom of parliament, the King cannot take notice of any thing said or done in the House of Commons by the report of the House of Commons; and every member of the Parliament hath a judicial place, and can be a witness; and this is the reason that judges ought not to give any opinion of a matter of parliament, because it is to be decided by the common laws, but *secundum consuetudinem parliamenti*, and so the judges in divers parliaments have confessed. And some hold that every offence committed in any Court, punishable by that Court, is to be punished (proceeding criminally) in the same Court, or some higher, and not in any inferior Court, and that the Court of Parliament hath no higher."

The books are full of authorities to the same effect. 2 Hawk. P. C. b. 2, c. 15, s. 73; 1 Black. Com. 462. De Grey C. J., in *Brass Crosby's case*, 3 Wils. 1. Powys J., in *Regina v. Paty*, 2 Lord Raym. 1109; 1

(a) 1 Hats. 57.

Camden C. J., in *Entick v. Carrington*, 2 Wils. 275; and more fully 19 How. St. Tr. 1019-47; Com. Dig. Parliament (G 1).

These authorities shew that the law of Parliament is a separate and distinct law, and that it is to be administered by those superior Courts, called the Houses of Parliament. In the following cases those principles have been judicially acted upon.

In *Darnel's* case (a), where the judges held that a commitment by the Privy Council was like a commitment by the Houses of Parliament, not to be examined by the Courts of Westminster Hall, the judgment was reversed by Parliament, and was denounced by the Petition of Right, but the distinction was clearly established, that commitments by either House are conclusive in the Courts of Law.

There are two cases of this nature (although the earliest to be found) upon which no great reliance can be placed, as they occurred during the time of the Republic; but, however, they are worth introducing, because it is well known that *Cromwell* was eager to have justice purely and properly administered. [Lord *Denman* C. J. I do not know that it can be said that *Cromwell* was so very eager for the pure administration of justice: he is known to have established Courts of High Commission, and it is stated, in the History of the Rebellion, by *Clarendon*, that he was constantly interfering with the judges (b).] It is true that *Clarendon* gives some strong instances of his interference with the administration of justice, but in the summary of his character he says, "that in all other matters which did not concern the life of his jurisdiction, he seemed to have great reverence for the law, rarely interposing between party and party (b)." Historians agree that he was desirous that the law should be impartially administered, and for that purpose he employed, and was able to obtain the services of Sir *Matthew Hale*, Chief Justice *Rolle*, and other most virtuous men.

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(a) 3 How. St. Tr. 1.

(b) See vol. iii. p. 507, folio ed., 1707.

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In Captain *Streater's* case (a), who was committed by the authority of the House of Commons, and sued out a writ of habeas corpus in the Upper Bench (as this Court was then termed), and applied to be discharged, Lord Chief Justice *Rolle* said, "Mr. *Streater*, one must be above another, and the inferior must submit to the superior, and in all justice an inferior Court cannot control what the Parliament does; if the Parliament should do one thing and we do the contrary here, things would run round; we must submit to the legislative power; for if we should free you, and they commit you again, why here would be no end, and there must be an end in all things."—"We are judges of the law, and we may call inferior Courts to account why they do imprison this or that man against the known laws of the land, and they must shew cause to any man. In this case, if the cause should come before us we cannot examine it, whether it be true or unjust."

Sir Robert
Pye's case.

Sir *Robert Pye's* case (b), as cited from *Ludlow's* Memoirs, is also worth mentioning. *Ludlow* says, "So low were the affairs of the Parliament, and their authority so little regarded, even in Westminster Hall, that Sir *Robert Pye*, who had been committed to the Tower by their order, suing for his habeas corpus at the Upper Bench, and Judge *Newdigate* demanding of the counsel for the Commonwealth what they had to say that it should not be granted, the counsel answered they had nothing to say against it. Whereupon the judge, though no enemy to monarchy, ashamed to see them so unfaithful to their trust, replied, that if they had nothing to say, he had; for that Sir *Robert Pye* being committed by an order of the Parliament, an inferior Court could not discharge him."

Lord *Shaftes-*
bury's case.

To come to the cases after the Revolution: in Lord *Shaftesbury's* case (c), who was committed to the Tower by the Lords, "for high contempt committed against the

(a) 5 How. St. Tr. 365; S. C.
Style, 415.

(b) Cited 5 How. St. Tr. 948.

(c) 6 How. St. Tr. 1269; 1
Freem. 153; 1 Mod. 144; 3 Keb.
792.

House," the Court held that it could not judge of the contempt, or discharge him; and *Rainsford J.*, said, "This Court has no jurisdiction of the cause."

The next case is *The Queen v. Paty (a)*, who was committed by the House of Commons for bringing an action, held to be maintainable by the House of Lords in the case of *Ashby v. White (b)*, against a constable for rejecting votes at an election. If in any case, therefore, the Courts could interfere, this would be that case; but eleven judges out of twelve were clearly of opinion, that whether the Commons were right or wrong in committing, they could not inquire into it.

Lord *Holt* differed from the rest of the judges. There is no judge who ever sat upon the English bench to whom greater respect is due; but he was one against eleven, and his opinion has been constantly overruled from the time that he gave it. He tried to distinguish, but in vain, between that case and the case of Lord *Shaftesbury*; he does not wish to overrule it, but only to satisfy his own mind. The reason he assigns for his judgment is this: "If the votes of both Houses could not make a law, by parity of reason they could not declare a law." Now, with all due respect for the memory of Lord *Holt*, that is most illogical; they cannot make the law, but they may declare the law. No Court of justice has the legislative power, but every Court of justice has the right to declare that law with the administration of which it is entrusted.

The reason of the judgment is to be found in the record at the end of the report in Lord Raymond: "*Et super maturâ deliberatione per Curiam hic habitâ pro eo quod ridetur curiæ hic, quod cognitio causæ captionis et detentionis predicti Johannis Paty non pertinet ad Curiam dictæ dominæ reginæ coram ipsâ reginâ, ideo idem Johannes remittitur præfato custodi gaolæ dictæ dominæ reginæ de New-*

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(a) 2 Ld. Raym. 1105; 1 Salk. MSS., 1837.

503; Holt, 256; Judgments of Lord Holt, printed from original (b) 2 Ld. Raym. 938; 14 How. St. Tr. 695.

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gate, remanere in statu quo fuit tempore emanationis b prædicti." This record was made up by the advice of the judges; and the reason of the judgment has not before noticed in discussions upon this subject.

In *Murray's case* (a), it appeared that he was committed to Newgate by the House of Commons for a contempt which was not specified in the warrant. He was brought up before the Court of King's Bench, and remanded. The great judge, Justice *Foster*, agreed with the rest of the Court, saying that "the law of parliament is part of the law of the land." The same reasons were given in *Murray's case* (a), as in *Paty's case* (b), viz. that it was within the jurisdiction of this Court to inquire into the privileges of parliament.

In *Brass Crosby's case* (c), the lord mayor of London acting judicially, had committed a person for a supposed breach of the peace. The commitment was considered a breach of the privilege of the House, because the person committed was an officer of the House, and the lord mayor was committed by the House of Commons to the Tower of London. The case was brought up by habeas corpus, and the case was learnedly argued by Serjeant *Glyn* and Serjeant *Jephson*, but he was remanded; and on what ground? Lord Justice *De Grey* says, "If either myself or any of my brothers on the bench had any doubts on this case, we should certainly have taken some time to consider." He goes on to shew, that according to all the authorities, the Court had no jurisdiction: "In *Sir J. Paston's case* 1 Rep. 64, there is a case cited from the Year Book, where it is held that every court shall determine of the privilege of that court;" so that in reality in this case the House of Commons claims no more than the inferior courts claimed, and possessed, and enjoyed. His lordship goes on to say, "Besides, the rule is, that the court of remedy shall judge by the same [law] as the court which commits."

(a) 1 Wils. 299.

(b) 2 Ld. Raym. 1105.

(c) 19 How. State Trials, 1
3 Wils. 188; 2 W. Bl. 754.

this Court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law, for the law by which the Commons judge of their privileges is unknown to us." "How then can we do anything in the present case, when the law, by which the lord mayor is committed, is different from the law by which he seeks to be relieved. He is committed by the law of Parliament, and yet he would have redress from the Common Law. The law of Parliament is only known to parliament men by experience in the House. The House of Commons only know how to act within their own limits. We are not a court of appeal; we do not know certainly the jurisdiction of the House of Commons. We cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges. We cannot judge of the contempts thereof; we cannot judge of the punishment therefore." "Again, if we could determine upon the contempts of any other Court, so might the other Courts of Westminster Hall. There are two sorts of privilege which ought never to be confounded, personal privilege, and the privilege belonging to the whole collective body of that assembly. For instance, it is the privilege of every individual member not to be arrested." "Courts of justice have no cognizance of the acts of the Houses of Parliament, because they belong *ad aliud examen*."

Next comes *Oliver's case* (a). He was committed at the same time with the lord mayor, whose case has been just examined, and applied to the Court of Exchequer to be discharged upon a writ of habeas corpus. He thought that that Court might come to a different conclusion; but in that case the Court confirmed the judgment of the King's Bench, and held that *Oliver* was not entitled to be discharged any more than the lord mayor. Accordingly he was remanded, as it is expressed in the report, "by the unanimous opinion of all the barons."

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(a) 2 W. Bl. 758.

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The next case in this class is *Rex v. Flower (a)*, which occurred in the time of Lord *Kenyon*. He was committed to Newgate under the order of the House of Lords, by which he was fined 100/., and ordered to be imprisoned in Newgate for six months, for a libel in the *Cambridge Intelligence* on the Bishop of *Llundaff*. He brought a writ of habeas corpus returnable in this Court, and the Court held they had no jurisdiction.

The last case upon this subject is *Rex v. Hobhouse (b)*. Mr. *Hobhouse* had been committed by the House of Commons; he sued out a writ of habeas corpus returnable in this Court. The ground of his application was stated by himself, that the House of Commons not having authority to commit him, this Court ought to take cognizance of the matter, and that he ought to be set at large. *Abbott C. J.* said, "Having conferred together upon this case, we are clearly of opinion that sitting in this Court we are not authorized to enter into the discussion of any of the objections taken by the gentleman on the floor to this commitment. It has been settled by many precedents brought from time to time before the different Courts of Westminster Hall; and finally, by the case of Sir *Francis Burdett v. Abbot (c)*, which went by writ of error to the Exchequer Chamber from this Court, and ultimately to the House of Lords, that it is competent for the House of Commons to commit for a contempt of their privileges. The cases of Lord *Shaftesbury (d)* and *Rex v. Paty (e)* are decisive authorities to shew that the Courts of Westminster Hall cannot judge of any law, custom, or usage of Parliament, and consequently they cannot discharge a person committed for a contempt of Parliament. The power of commitment for contempt is incident to every Court of justice, and more especially it belongs to the High Court of Parliament, and therefore it is

(a) 8 T. R. 314.

4 Taunt. 401; in Dom. Proc. 5

(b) 2 Chit. Rep. 207; 3 B. &
Ald. 420.

Dow, 165.

(d) 6 How. St. Tr. 1269.

(c) 14 East, 1; in Exch. Ch.

(e) 2 Ld. Raym. 1105.

incompetent for this Court to question the privileges of the House of Commons, on a commitment for an offence which they have adjudged to be a contempt of those privileges."

It has likewise been decided, that, where there has been a commitment and discharge by a habeas corpus, no action will lie for the false imprisonment. *Bushell's case* (a) and *Hamond v. Howell* (b) prove this.

In *Tash's case* (c), *Williams's case* (d), and the case of *Mr. Coke's servant* (e), which were committals by the House of Commons, if an action had been brought, the question would have arisen *directly*, whether any such privilege to commit existed, and it is clear that the Courts would not have interfered.

The next class of cases shews, that whatever is decided by Courts of exclusive jurisdiction is conclusive, so that wherever incidentally, in another Court, any question thereon arises, the Court where the question arises incidentally is bound by the opinion of the Court of original jurisdiction. There are cases also which shew that, in various instances, a Court of peculiar jurisdiction has interposed to prevent questions, that ought to be decided by itself, from coming for decision before any other tribunal whatever. First, the question of prize or no prize, cannot be tried at the Common Law, but must be tried in the Court of Admiralty; *Mitchell v. Rodney* (f).

In *Home v. Earl Camden* (g), the Court of Common Pleas granted a prohibition to the Lords Commissioners of Appeal from the Court of Admiralty, with respect to certain property taken as prize and sought to be distributed according to the act of parliament; but, upon a writ of error, that judgment was reversed in the King's Bench; and upon a writ of error brought in the House of Lords, the judgment

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(a) Vaughan, 135; 1 Mod. 119,
184; J. Jones, 13; 3 Keb. 322;
Freem. 1.

(b) 1 Mod. 184.

(c) 1 Hats. 190.

(d) 1 Hats. 92.

(e) 1 Hats. 112.

(f) 2 Br. P. C. 423.

(g) 1 H. Bl. 476.

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of this Court, reversing the judgment of the Court of Common Pleas, was affirmed (a).

Le Caux v. Eden (b) is a still stronger case. That was an action of trespass and false imprisonment, by one of the crew of a ship taken as a prize by a privateer, and it was held that an action did not lie, the ship having been taken as prize and released by the Admiralty. So in the judgment given by Lord Mansfield, in *Lindo v. Rodney* (c), his lordship says, "The nature of the action being prize or no prize, which not only authorizes the Prize Court but excludes the Common Law, the Common Law cannot entertain or give any opinion where there is a question arising that is properly referable to a Court of peculiar jurisdiction."

The decisions of foreign courts of prize, professing to be guided by the law of nations, during war in an enemy's country, are held to be binding in all courts, even as to the facts that are found in the judgment; *Geyer v. Aguilar* (d); *Hughes v. Cornelius* (e).

The same doctrine prevails with regard to other Courts; of which the following instances may be cited: *Bouchier v. Taylor* (f), *Martin v. Wilsford* (g), *Fuller v. Fotch* (h), *Prudham v. Phillips* (i), *Duchess of Kingston's case* (k), *Da Costa v. Villareal* (l), *Scott v. Shearman* (m), *Cooke v. Sholl* (n), *Brittain v. Kinnaird* (o) (where the judgment of Richardson J. is very much in point), and *Hart v. M'Namara* (p).

The following cases shew, wherever incidentally a question comes before a court which has not original jurisdic-

(a) Judgment reversed by K. B. 4 T. R. 382; Judgment of K. B. affirmed in Dom. Proc. 2 H. Bl. 533; 6 Bro. P. C. 203.

(b) 2 Doug. 594.

(c) 2 Doug. 613, n.

(d) 7 T. R. 681.

(e) 2 Show. 232.

(f) 4 Br. P. C. 708.

(g) Carth. 323.

(h) Ib. 346; S. C. Holt, 287.

(i) Amb. 763.

(k) 20 How. St. Tri. 537-45; Amb. 756.

(l) 2 Str. 961.

(m) 2 W. Bl. 977.

(n) 5 T. R. 255.

(o) 1 Brod. & B. 432.

(p) Cited in *Rex v. Norton*, 4 Price, 154, n.

tion upon it, that the court incidentally deciding the question is bound by the law of the court of original jurisdiction. *Juron v. Byron* (a), *Shotter v. Friend* (b), *Barnes's case* (c), *Gould v. Gapper* (d), *Carter v. Crawley* (e).

So the Courts of Law would be bound by the resolutions of the House in *Wilkes's case* (f); the last resolution, as to there being no privilege in cases of libel, being the law to the present day.

Other cases shew that courts of exclusive jurisdiction have been in the habit of preventing the interference of other courts; *Anonymous* (g), *Cawthorne v. Campbell* (h), where an elaborate judgment was pronounced by *Eyre C. B.*, and which was acted upon in *Anonymous* (i). In the same manner the Court of Chancery will not allow a receiver to be sued; *Angel v. Smith* (k), *Ex parte Clarke* (l), *Serjeant Scroggs's case* (m). The House of Lords exercised exactly the same jurisdiction in 1827 under the guidance of Lord *Eldon C.*, and treated an action brought by a person in the Court of Conscience, for an umbrella, which he had left in the lobby of the House, as a contempt (n). Exactly the same course had been pursued by the House of Lords, in *Biggs's case* (o), in 1761; and in *Hyde's case* (p), in 1788.

Another class of cases may be cited, in which to avoid any questions of privilege, although no act of either House was in question, still, to prevent the possibility of a collision, it has been held, that no action could be maintained. Such are the actions for a false or double return, which, it is clear, do not lie at common law. The point first arose in *Nevill v.*

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(a) 2 Lev. 64; S. C. 2 Salk. 537.

(b) 2 Salk. 547; S. C. 1 Show. 158—172.

(c) 2 Roll. R. 157.

(d) 3 East, 472; S. C. 5 East, 345.

(e) T. Raym. 496.

(f) 19 How. St. Tr. 981; S. C. 2 Wils. 151.

(g) 1 Lane, 55.

(h) 1 Anstr. 205, n.

(i) 1 Anstr. 205.

(k) 9 Ves. 335.

(l) 1 Russ. & Mylne, 563.

(m) 6 Bac. Abr. 530, *Privilege*, (B. 2).

(n) 59 Lords' Journ. 199, 206.

(o) 32 Lords' Journ. 185.

(p) 38 Lords' Journ. 250.

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Stroud (a), but was not decided; and although the contrary was held in *Bernardiston v. Some* (b), which is relied on by the other side, that case was overruled in error; and North C. J. held, that the remedy must be provided by the legislature, who accordingly passed the 7 & 8 Will. 3, c. 7. The judgment of North C. J. is of extreme importance. He said, "I must needs reflect upon the second reason I gave against the action, that the matter of it is *alieni fori*. I find myself, and my brothers that argued for the action, engaged in a discourse of the nature of a double return, and the course of Parliament upon it, which, as a judge, I cannot so well speak to. I had the honour to be of this House of Commons, and, whilst I was there, I considered as well as I could the course of the proceedings of the House, and am therefore able to speak something of them, and I am brought into this discourse necessarily by this action; but I must needs say, it is an improper discourse for judges, for they know not what is the course of Parliament, nor the privilege of Parliament. When the Lords in Parliament, whom they are bound to assist with their advice, ask the judges anything concerning the course or privilege of Parliament, they have answered that they know them not, nor can advise concerning them. If in Parliament we do not know nor can advise concerning these things, how can we judge upon them out of parliament? We ought to know before we judge, and therefore we cannot judge of things we cannot know. Our being engaged in a course improper for judges, shews the action to be improper as much as any other argument that can be made; and this argument arises from my brothers that argued for the action. It is my opinion that no new device ever was or can be introduced into the law, but absurdities and difficulties arose upon it which were not foreseen, which makes me very jealous of admitting novelties."—(That was an action of the

(a) 2 Sid. 168; S. C. 2 Lev. 115; 430; in Exch. Ch. 6 How. St. Tr. 3 Lev. 30. 1070; in Dom. Proc. 6 How. St.

(b) 2 Lev. 114; Freeman, 390, Tr. 1117.

first impression, and so is this.)—" But in matter relating to the Parliament, which is my second ground, there is no need of introducing novelties, for the Parliament can provide new laws to answer any mischiefs that arise, and it ought to be left to them to do it."

That judgment was affirmed in the House of Lords (*a*), and the same judgment was given in *Onslow's* case (*b*), and in *Prideaux v. Morris* (*c*), where *Holt* C. J. himself recognized the doctrine. In *Wynne v. Middleton* (*d*), indeed, *Willes* C. J. expressed an opinion, that the action did lie at common law, but that is clearly contrary to all the authorities.

The next class of cases comprises those in which prosecutions or actions have been brought for what passed in Parliament or for acts done by the authority of Parliament. In all these cases it will be found it was either held originally that the prosecution or action could not be maintained, or any judgment in favour of such prosecution or action has been reversed. The earliest case upon this subject is the *Bishop of Winchester's* case (*e*); where it was determined that a Court of Common Law had no jurisdiction to inquire whether the bishop was amenable for having absented himself from Parliament. In *Plowden's* case (*f*) an information was filed in this Court against the defendant for departing from Parliament without license, the defendant traversed, but the issue was never tried.

Strode, it is well known, was imprisoned for proposing a bill in parliament (*g*), which was the occasion of passing *Strode's Act*, to reverse the judgment against him, 4 *Hen.* 8, c. 8, this was afterwards resolved by both Houses, in 1667 (*h*), to be a general act. In *Sir J. Eliot's* case also (*i*), the prosecution for acts done in parliament in the first instance succeeded: but the judgment was reversed in the House of

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(a) 6 How. St. Tr. 1117.

(b) 2 Vent. 37; S. C. 3 Lev. 39.

(c) 2 Salk. 502; S. C. 1 Lutw.
82.(d) 1 Wils. 125; S. C. Willes,
597.

(e) 4 Inst. 17.

(f) 1 Parl Hist. 625; 4 Inst. 17.

(g) 1 Hats. 85; 4 Parl. Hist. 85.

(h) 9 Comm. Journ. 19; 12
Lords' Journ. 166.

(i) 13 How. St. Tr. 293.

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Lords (a) and overruled by the petition of right. *Rex v. Williams* (b) is also a strong legislative authority in favour of the defendants.

In that case an elaborate argument was prepared by Sir Robert Atkyns, at that time a retired judge, but which was never delivered, as the report in 2 *Show.* 471. evidently contains all that passed, which could not have occupied five minutes. The judgment of the Court, which fined Williams 10,000*l.* for having, as Speaker of the House of Commons, given an order for the printing of *Dangerfield's Narrative*, it is well known, was one of the chief grounds alleged for dethroning James 2. That case cannot be distinguished from the present, for if it was rightly decided, the defendants cannot resist the present action. The House of Commons however voted, in 1688, that the judgment was illegal, and a clause in the Bill of Rights (1 *W. & M.* c. 2,) distinctly points out the illegality of the proceedings.

It has been alleged that the fine was collusively imposed in *Rex v. Williams* (c) as in *Skinner v. East India Company* (d); but this fact is not clearly made out.

An attempt has been made to draw a distinction between prosecutions and actions; and it is said that prosecutions only are mentioned in the Bill of Rights. But could it be intended that the Speaker and members of the House should be free from criminal proceedings, and yet be liable to actions for damages, and be placed at the mercy of a jury, and become liable to an amount utterly ruinous for any thing done by them under the authority of the House? The case of Sir William Williams, when taken in conjunction with the Bill of Rights, is an authority to shew that neither prosecution nor action can properly be brought against the Speaker, or any officer of the House, for any thing done under its authority. *Jay v. Topham* (e) is another case of the same sort. It was an action of trespass against the Serjeant-at-arms for

(a) See 3 *How. St. Tr.* 319, 333.(d) 3 *Hats.* 345.(b) 13 *How. St. Tr.* 1369.(e) 2 *Nels. Abr.* 1248, cited 14(c) 13 *How. St. Tr.* 1369.*East*, 102, n. (a).

executing a warrant granted by the Speaker. The defendant pleaded that the Court ought not to have cognizance of the matter, for that he did the act under the authority of the House of Commons; and, on demurrer, the Court, comprising Sir *F. Pemberton* and Sir *T. Jones*, held the plea to be bad. After the Revolution, proceedings were taken in the House of Commons against these judges for their judgment; and they alleged, on examination at the bar, that their judgment proceeded on the ground of the plea being bad, as a plea to the jurisdiction; and acknowledged, that if the plea had been in bar, it would have been good. They were, however, committed by the House, and properly, for it appears by the plea in 2 *Nels. Abr.* 1248, and *Topham's* petition to the Commons, 10 *Comm. Jour.* 164, that after his plea to the jurisdiction had been overruled, he pleaded the orders of the House in bar, and judgment was given against him. The decision therefore of *Pemberton* and *Jones* according to their own shewing was either wanton or corrupt. In *Verdon v. Topham* (a), which was a similar action, the plea was to the jurisdiction, and was therefore bad. In *Lord Peterborough v. Williams* (b), which was an action arising out of the same proceedings, no judgment was ever given.

Dangerfield himself was also prosecuted for publishing *The Narrative* (c), but no account of the trial is to be found which states what act of publication was complained of. It may have been for some publication which the order of the House did not cover. If it was for presenting *The Narrative* at the bar, it was an act done in Parliament, and clearly legal.

The next case is *Burdett v. Abbot* (d), which was an action against the Speaker for issuing a warrant for the plaintiff's arrest, and it was held that the action would not lie. That

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Abbot.(a) *T. Jones*, 208.

603.

(b) 2 *Show.* 505; 13 *How. St. Tr.* 1437.(d) In *K. B.*, 14 *East*, 1; in *Ex. Chamb.*, 4 *Taunt.* 401; in *H. of*(c) 3 *Mod.* 68; 11 *How. St. Tr.**Lords*, 5 *Dow*, 165.

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case is a direct authority for the defendants. *Burdett v. Colman* (a) which was an action arising out of the same proceedings, against one of the parties making the arrest, is material to shew that there is no distinction between the officer of the House and a member of the House, and that the same protection was to be extended to both (b). Suppose Sir *Francis Burdett*, instead of bringing trespass, had brought an action for libel against the Speaker, as he might, the cases would have been identical with the present, and all the grounds of the judgment in that case would have been equally applicable here.

No instance
of actions
brought.

There are several cases in which an action would have been brought if it had not been always admitted that no action at law lay. For instance, at the time the Commons disputed the jurisdiction of the Lords in matters of appeal from Equity, and when they committed the counsel in the case of *Shirley v. Fagg* (c) who appeared in the House of Lords against the defendant, who was a member of the Commons. There was a violent collision between the two Houses, but it was not settled by an action, but by the House of Commons acknowledging that the Lords possessed this jurisdiction. It is alleged that the reason no action has ever been brought is, because the people have always submitted to the House of Commons, but the constant recurrence to the writ of habeas corpus in the cases of Lord *Shaftesbury*, *Paty*, *Flower*, *Crosby*, *Murray*, and *Hobhouse*, shews that individuals have always been found to question at law what has been done by either House. It is laid down by *Littleton*, s. 108, that the not bringing an action when it might be brought, if maintainable, is the strongest evidence that no such action lies.

(a) In K. B. 14 East, 163; S. C. (in the H. of Lords) 5 Dow, 170.

(b) Lord *Brougham*, who was sitting on the Bench, stated that *Burdett v. Colman* never went to the House of Lords; that he was counsel in *Burdett v. Abbott*, and that *Clifford*, who argued it in the

Exchequer Chamber, died before 1817. His lordship however, on the following morning, stated that he found he had been mistaken; and that *Courtenay* had argued the case in the House of Lords.

(c) 6 How. St. Tr. 1121.

Next as to the cases supposed to be favourable to the plaintiff. In *Atwyll's* case (*a*), *Atwyll* being member for Exeter, and having writs of *fi. fa.* and *ca. sa.* issued against him, brought the matter before the House of Commons, who applied to the Lords on the subject; and this is relied on to shew that the House of Commons is not a court of exclusive jurisdiction on privilege. But the application to the Lords was in the nature of a conference, and the act that was passed on the subject was necessary in order to preserve to *Atwyll's* creditor his remedy when the session should be closed. *Larke's* case (*b*), and the cases of *Clerke* (*c*) and *Hyde* (*d*), are similar. The *Prior of Malton's* case (*e*) is supposed to be unfavourable to privilege, but it is difficult to see how it bears. It was an action against the sheriff of York for arresting the Prior on his return from parliament by his horses and harness, and no further proceedings appear. Next comes *Trewynnard's* case (*f*), where a member of parliament, in execution for debt, was discharged by order of the House of Commons, and an action was brought against the sheriff for an escape, but no judgment appears. The case therefore, like the preceding, is of no authority. But the argument of *Dyer* for the sheriff is applicable, "although Parliament should err in granting this writ (that is in setting a member at liberty,) yet it is not reversible in another Court." 1 *Dyer*, 61 b. *Donne v. Walsh* (*g*) is a case in which the servant of a peer, being sued in debt on bond, obtained a writ of privilege, setting out a custom that neither lords nor knights &c., nor their servants, ought to be arrested or impleaded during parliament; but the Court held that the privilege did not extend to prevent the defendant from being impleaded, and ordered him to plead over. There however the question of privilege arose incidentally, no act of either House was in question, and the privilege claimed was

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merely personal. *Ryver v. Cosins* (a) is to the same effect. *Pledall's* case (b) is the next, when the two Houses resolved, that binding a member to appear in the Star Chamber after the session, was no breach of privilege. In *Cook's* case (c), where the Lord Chancellor refused to allow the immunity of a Member of the Commons from a subpoena, the parliament was dissolved before the question was decided, and therefore the precedent is valueless.

The next case is *Benyon v. Evelyn* (d) which has been supposed to be an authority to shew, that there is a general jurisdiction in the Courts of Law to examine and overrule what is done by authority of Parliament. Upon examination it will be found that there no question arose in which either House of Parliament was interested. The action was clearly barred by the Statute of Limitations, and the suggestion that the defendant was privileged was an ingenious expedient on the part of the plaintiff, by which he sought to deprive the defendant of the benefit of his plea.

The action was in *indebitatus assumpsit* for goods sold and delivered on the 1st of April, 1657; the plea was *non assumpsit infra sex annos*. Replication, that the defendant was a Member of the House of Commons at the time of the promise, and till the death of *Charles 1*, when parliament was dissolved by such death, and that, by the privilege of Parliament, every person being a member thereof is and ought to be free from all actions, suits, and prosecutions, unless for treason, felony, or breach of the peace, so that it is not lawful to sue out any original writ or bill against a member of Parliament from any Court of our lord the king sitting the parliament, and that from the death of *Charles 1*, to 29th May, 12 *Charles 2*, (1660, the date of the Restoration,) there was not any Court of Chancery of our lord the king from which an original writ could issue; nor any other Court of record of our lord the king open, in which the plaintiff could have brought his action in that interval;

(a) 1 Hats. 42.

(c) 1 Hats. 96.

(b) *Prynne's Reg.* 4th part, 1213.(d) *O. Bridg.* 324.

and that the action was brought within six years from the 29th May, 12 *Charles* 2. The rejoinder by the defendant was, that the cause of action, if any, accrued to the plaintiff on the 20th of July, 21 *Chas.* 1. (1645), and that from thence to the death of the late king, and from thence hitherto the Court of Chancery and other superior Courts at Westminster were open : so that the plaintiff might have freely prosecuted his action with effect. There was a sur-rejoinder by the plaintiff, " that the defendant was a member of parliament till 30th January, 1649, so that the plaintiff could not sue out any original writ or bill against him ; and that from thence till the 29th May, 1660, there were no Courts of our lord the king in which the plaintiff could have sued the defendant." Whereupon there was a demurrer and a joinder in demurrer. Upon the record there really was no question for argument, for it was admitted that much more than six years had elapsed from the cause of action accruing until the suing out of the writ, which was the commencement of the action. The 21 *Jac.* 1, c. 16, contains no exception with regard to members of parliament, or with regard to the suspension of the Courts of justice ; and it was wholly unnecessary for the Court to consider the question whether a member of parliament was privileged from being sued sitting the Parliament or not. The whole Court concurred in the doctrine, that even if the member had been so privileged, the statute would still have been a bar. Besides the judgment rested on the ground that it was necessary to decide a question of privilege arising incidentally, which may be admitted, and this was the way *Bayley* J. considered the case (a).

Sir *Orlando Bridgman* C. J. went into the subject at great length, but his dicta with regard to privilege were clearly extrajudicial. The only reason he gives for entering upon the question is the regard he had for his oath, which really could have no bearing on it ; for if there had been a resolution of the House of Commons on the subject, that

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would have been a declaration of the law of Parliament which his oath would have bound him to be guided by. It is clear that he did not believe there had been any such resolution. The authorities cited by Sir O. Bridgman do not support his argument. The first case from 39 *Edw. 3*, f. 14 A, m shews that the certificate of the Bishop as to bastardy is conclusive, and is cited for that point by *Fitzherbert* (*a*), *Rolle* (*b*), and it does not touch the question of privilege. The other case cited by him, *Staunton v. Staunton* (*c*), is more applicable, for no question of privilege arose there and the decision in the case throws no light on the point as to the exclusive jurisdiction of parliament. *Fitzharris* case (*d*) proves nothing. In that case there was a dispute between the two Houses: *Fitzharris* having been impeached by the Commons for high treason, the Lords resolved that he should be proceeded against at common law and the Commons voted this resolution to be a denial of justice. Parliament having been dissolved two days after this vote, *Fitzharris* was indicted at common law, pleaded in abatement, that an impeachment was pending against him; but the Court overruled the plea, and he was tried and executed. But in this case no question of privilege arose, and the judgment of the Court proceeded on the ground that an impeachment depending after the House of Commons was dissolved was no bar.

Lord Banbury's case.

The next case is that of *Knollys* or Lord Banbury, who on being indicted for murder pleaded in abatement that he was Earl of Banbury. The replication stated, that the defendant had petitioned the Lords to be tried on the indictment, and they disallowed his peerage; on demurrer to the replication it was overruled and properly, because the Lords without a reference from the crown (which was averred) have no jurisdiction in matters of peerage. It was after that case that Lord Holt C. J., being summoned by

(a) *Fitz. Abr. Bastardy*, pl. 8.(d) 8 *How. St. Tr.* 223.(b) 2 *Roll. Abr.* 592, l. 35.(e) 12 *How. St. Tr.* 116(c) *Fitz. Abr.* 13, E. 3, Voucher, Salk. 509; 1 *Ld. Raym.* 10. 119.

the Lords, very properly refused to give any reasons in an irregular manner for the judgment he had pronounced. The celebrated case of *Ashby v. White* (a) is supposed to be an authority for the plaintiff, but the question there was not one of parliamentary privilege, but turned, as Lord Holt said, on the common and statute law. The decision itself was condemned by Lord Mansfield in *Milward v. Sergeant* (b), though it has been held since that the action will lie if there was any malice in the returning officer; *Drewe v. Coulton* (c), *For v. Corbett* (d).

The case of *The Duchess of Somerset v. The Earl of Manchester* (e) is cited for the dicta contained in it. That was a case before the delegates touching the will of the Earl of Essex. The defendant, being a Peer, wrote a letter to the delegates, claiming forty days privilege before the session to put off the sentence. The letter was clearly waste paper, which the delegates need have taken no notice of. They however came to certain resolutions, which were hasty and extrajudicial. The *Duchess of Kingston's* case (f) may perhaps be referred to, where on a trial for bigamy it was held that the sentence of the Ecclesiastical Court, which had been obtained by the fraud of the Duchess might be impeached. It was, however, fully admitted, that a valid sentence of the Ecclesiastical Court would have been conclusive. The decision of Lord Brougham C. in *Long Wellesley's* case (g) has been relied on; but his decision there was in conformity with the resolution of the House of Commons. In his preface to that judgment (h) his lordship has fallen into several inaccuracies on the subject. He supposes the claim of servants of members to be free from arrest was illegal; it was however recognized by the law of the land till abrogated by the 10 Geo. 3, c. 50, and not, as is alleged by him, silently abandoned. He supposes also that members formerly claimed

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Earl of Man-
chester.**Long Welles-
ley's case.*(a) 2 Ld. Raym. 938; S. C. 14
How. St. Tr. 695.

(b) 14 East, 59, n.

(c) 1 East, 563, n.

(d) Cited 14 East, 62.

(e) Pryn. Reg. Part 4, 1214.

(f) 20 How. St. Tr. 355.

(g) 2 Russ. & Mylne, 639.

(h) 4 Ld. Brougham's Speeches,
342.

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the privilege of sanctuary for their houses, but no such claim was ever asserted. *Lechmere Charlton's* case (a) is the last upon this subject. In that case also Lord *Cottenham* C. rejected the claim of privilege in conformity with the report of the Commons of privileges, that no such privilege existed (b).

III. The last point to be made out is, that the House of Commons has the privilege of ordering reports, though criminatory, to be published. If the House has this power, of course no action can be maintained for what is done in the exercise of it. It is conceded that such reports and papers may be lawfully printed for the use of the members of the House, and may be distributed among them, but the delivery of a copy to any one not a member of the House is said to be illegal. Assuming that the circulation must be confined amongst the members of the House, and that the court can inquire what is the extent of the privilege, there would be no defence to this action. Upon the record there is a publication admitted to a person not alleged to be a member. And it does not appear whether the publication in this case was for sale; but that circumstance is immaterial.

It may be observed that this question is of no importance to the plaintiff, though of the greatest importance to the public. For it being conceded that 658 copies may be published for the members of the House of Commons, and a number of copies also, it is presumed, for the House of Lords, the plaintiff is exposed to have his character blackened before some of the most distinguished members of society, without any possibility of redress. He is not even enabled to obtain a copy of the report, to ascertain what the attack is, for any one communicating it to him would be subject to an indictment for publishing a libel. But how is the circulation to be confined to members? What is to

(a) 2 Mylne & Craig, 316.

(b) The Attorney-General here read passages from "Lex Parliamentaria, or a Treatise of the Law and Custom of the Parliament of England," 54, 83, to prove that the

two Houses of Parliament formed still but one court, and that they are superior to all other courts of the kingdom, and that it is not competent to the judges to judge of any law or privilege of Parliament.

be done with their copies when they die, or when they cease to be members? Is it allowable to give the peers copies, or the judges who are summoned to the House of Lords, or the public libraries? Is it possible that there can be a rule at law, which it is so impossible to obey. The privilege of publishing can be proved to exist in three ways: 1. by the necessity for it; 2. by usage; 3. by its having been acquiesced in. 1st. There is no absolute necessity for the limited privilege of publishing for the use of members, which is conceded to exist; as they might always be present to hear the reports read. But convenience points out that they should be printed; the same necessity exists for the publication of reports generally. In the reign of *Hen. 8* the Chancellor directed the members to repeat in their counties what they had seen and heard.

It being in the power of parliament to make the most violent changes in the law, it is fitting that the people should be informed of the grounds of legislation. It is shewn by *Hume* that, prior to the 27 *Hen. 8*, dissolving monasteries, reports of commissioners were published pointing out the abuses which prevailed in those establishments. So on all important changes of the law, by the Exclusion Bill, or Suspension of the Habeas Corpus Act, the Regency Bill, the Abolition of Slavery, and the Poor Law Amendment Act, it was quite requisite that the people should be informed why such great changes in the laws were made. So also with regard to gaols the people are deeply interested in any measures affecting their regulation.

Again, the inquisitorial powers of the Commons cannot be exercised unless the people are informed of the grounds on which the House proceeds. Suppose a charge was brought against a judge for corruption, or for incapacity through age, how could the Commons hope to obtain his removal unless the public voice, after communication of the facts, should bear them out in their proceedings. It must be conceded that the Votes and Journals of the House of Commons must be made public. The orders of the House of Commons published in the Votes have often the

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force of law both with regard to Private Bills and other matters of which the public are bound to take notice. So also any one may search the Commons' Journals, and they are continually given in evidence in Courts of Law. The question then is, would an action lie for any thing contained in the Votes and Journals? If not, it may be shewn that there is no distinction between the Votes and Journals and these Reports; this very report might have been printed amongst the Votes, and it depends upon the will of the House whether these should be printed altogether or whether, if more convenient, they should be printed separately.


Proof of usage
of privilege.

2. Next as to usage, although it seems singular that in arguing a demurrer counsel should be called upon to look out of the record, and to bring forward facts in support of the privilege alleged in the plea. The instances of usage are collected in the House of Commons' Report from the Committee on Publication of Printed Papers, 8th May, 1837. Besides which there are other instances. The earliest express proof of publication is in 1641, but no earlier authority can be found for the privilege of printing for the use of members. Till the reign of *Elizabeth* there is no instance of the privilege of commitment. It is probable, however, that before the invention of printing some mode of circulation of information by the parliament was in use, just as acts of parliament were published at the county courts. From 1641 to 1680 various resolutions are to be found for printing specific papers, an instance of which is to be found in *Thompson's* case (a), where the form of appointment of a printer is to be found.

In 1680, a general resolution was adopted, for printing the votes and proceedings of the House, which has been renewed every session, with the single exception of the year 1702. During all that time more copies have been printed than were necessary for the use of members, and sale to the public has been made, with full knowledge of the House. It has been said that, as the usage commenced under the long Parliament in 1641, the precedent is valueless; but at

(a) 8 How. St. Tr. 1.

that period the government was regular, and statutes passed then are still in force; and it is not till after *Charles* 1. left London for the North, that *Hatsell* lays it down that the precedents are not to be quoted. After the Restoration, this precedent was adopted and acted upon to the present hour, and the debate upon the subject, 4 Parl. Hist. 1306, in 1680, is worthy of attention. Orders for printing have been made in two different forms, one in general terms, the other for the use of members. Sometimes it will be found that, on debate, the general printing is negatived, and the limited resolution adopted. Occasionally papers have been first directed to be printed for the use of members, and afterwards they have been ordered to be printed, without any restriction. These papers, so published, have often and necessarily contained criminatory matter. The Reports on the South Sea Bubble, Slave Trade, and Municipal Corporations, may be referred to as examples.

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3. Next, it is to be shewn, that there has been acquiescence in this usage, which appears sufficiently from this, that, except in *Rex v. Williams* (a), and the proceedings by the present plaintiff, no attempt has ever been made to dispute the legality of the publication. *Litt.* s. 108, states, that "no action being brought, proves that no action will lie;" and *Buller J.* in *Le Caux v. Eden* (b), holds language to the same effect. If the Speaker is to be held responsible for the publication of Reports, every person, who thinks his character attacked, may bring him before any tribunal, civil or criminal; for, according to *Hawkins's P. C.* b. 1, c. 28, s. 7, any thing published hurtful to the feelings of another is a libel. The Lord Chancellor, as Speaker of the House of Lords, is in the same position. A parliamentary recognition of the circulation of these Reports among the public, is to be found in the 42 *Geo.* 3, c. 63, s. 10, which enables members of parliament to send the votes or proceedings in Parliament by the post, free from expense.

Authorities
 for usage.

The following are all the objections which can be urged

(a) 13 How. St. Tr. 1369.

(b) 2 Dougl. 602.

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against the privilege. 1st. It is said that it is altering the law of the land to declare that libels may be lawfully sold. But this is *petitio principii*, because it assumes that the Commons, by the law of the land, have no power to order the publication. 2d. It is asked, shall the House of Commons open a libel shop? But this is the same objection in other words; an indictment might as well be called a libel and the office of the clerk of assize a libel shop. 3d. It is said, shall a private individual suffer from an illegal act and have no remedy? But this again begs the question. It must be first shewn there is a wrong, and there must be *damnum cum injuriâ* to give a cause of action. It is not every loss or inconvenience that constitutes a wrong. For many of the most opprobrious expressions, that can be applied to a man or woman, no action lies. So on a prosecution for felony, with an honourable acquittal, although the defendant may have been ruined by the vexation and expense, he has no remedy, unless the prosecution was instituted through malice. So no action will lie against a witness for evidence given by him, or against a counsel, or for a committal by either House, or against a commander for suspending an officer, or for loss of letter against the postmaster-general, or for any confidential communication, or for exhibiting articles of the peace, even though falsely, or for impressment of seamen. 4th. It is said that the privilege cannot belong to the Commons, because the Speaker, at the beginning of every Parliament, asks for certain privileges from the Crown, and this is not among them. But privileges are inherent in the House of Commons, and as ancient as prerogative. The prayer to the Crown was only begun in the reign of *Hen. 4*, and the House of Commons, in 1621, entered a protest on their journals (*a*), claiming their privileges as the birth-right of Englishmen. 5th. It is said the privilege is unnecessary; and that without it, reports would be sufficiently circulated in the same manner as debates. But there is a marked difference between the two. With regard to reports, only

(*a*) 1 Hats. 78.

certain papers are to be published; a discretion is exercised by the House; and, when necessary, an order must be given, which must be carried into effect by the Speaker and officers of the House. But debates are published without the authority, and against the orders of the House, because occasionally it has been found most expedient, and it is their privilege, to have their debates in private. 6th. It has been said, reports might be published, without any libellous matter; but this is impossible, where matters of abuse are to be inquired into. It has also been suggested, that the party aggrieved should be recompensed out of the public purse, in an action for damages; but the consequence of such a rule would be to encourage all manner of actions, and exorbitant damages would often be given when the public had to pay. Besides, this rule would still leave the Speaker exposed to criminal proceedings. 7th. It is said that all privileges must exist by prescription; and the recent origin of this has been shewn. But this objection would defeat all the privileges of the House of Commons; for it has only become a separate branch of the legislature since the time of legal memory. The jurisdiction of the Court of Chancery, of the House of Lords on appeals from equity, and of the Courts at Westminster Hall, all depend on usage commenced since that period. The power, which it has been decided belongs to a Court of Oyer and Terminer, to prohibit publication of its proceedings, *Rex v. Clement (a)*, does not appear to have been exercised before the impeachment of Lord *Melville*, in 1806. Commitments by the House, it has been shewn, do not date back earlier than the reign of *Elizabeth*; so also the power of the House to discharge members confined under civil process for debt, without writ of privilege, is of very recent origin; *Colonel Pitt's case (b)*. So also printing for the use of members does not date back earlier than 1641. Before the invention of printing, Com. Dig. Parl. (G 23) shews that acts were transcribed and proclaimed at the County Court, and that every man might take a copy of

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(a) 4 B. & Ald. 218.

(b) 2 Str. 985.

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them, but that this mode of publication was disused and printing had been adopted. Printing, therefore, came merely in place of a former mode of publication. 8th. The hacknied topic of abuse has been relied upon, which has been already discussed.

The authorities on this branch are now to be referred to. In *Lake v. King* (a), it was held that printing and distributing copies of a petition to members of a committee was lawful, though it contained criminatory matter. *Rex v. Williams* (b) is also an authority for the defendant, as the decision in it may be considered to have been reversed by the Bill of Rights, 1 W. & M. sess. 2, c. 2 (c). In *Rex v. Wright* Lord Kenyon and the Court refused a criminal information for publishing, without the order of the House, a copy of a Report of a Secret Committee of the House of Commons containing an alleged libel on *Horne Tooke*; and his lordship said, "it is impossible for us to admit that the proceedings of either of the Houses of Parliament are a libel." The present case, therefore, goes much further than the present.

In *Rex v. Clement* (e), a court of oyer and terminer issued an order to prohibit the publication of proceedings before them; and it was held, after much discussion, that a court of justice has a right to make such orders as are necessary for the pure administration of the law; and the defendant having been fined, and the fine estreated into the Duchy Court of Lancaster, that Court, assisted by *Bayly* and *Hullock* B., held that the order and fine were legal. In *Layer's* case (g), on the other hand, the judges of the Court ordered the publication of the trial. So also in *Conney v. Longman* (h), it will be seen that the House of Lords ordered Mr. Gurney to publish the proceedings in

(a) 1 Saund. 131 a; S. C. 1 Lev. 240.

(b) 13 How. St. Tr. 1369; S. C. Comb. 18.

(c) The Attorney-General here cited a MS. in the handwriting of Sir William Williams, in the possession of the Right Hon. C. Williams

Wynn, to show that the 9th article of the Bill of Rights did refer to this case.

(d) 8 T. R. 293.

(e) 4 B. & Ald. 218.

(f) Cited from a MS. not

(g) 16 How. St. Tr. 93.

(h) 13 Ves. 493.

Melville's trial, and that no other person should presume to publish the same. The same order was made on the trial of Dr. *Sacheverel*, in 1717, of Lord *Lovat*, in 1746, of Lord *Ferrers*, in 1760, of Lord *Byron*, in 1763, and of the Duchess of *Kingston*, in 1776. So in *Manley v. Owen* (a), Lord *Hardwicke* held that the lord mayor, as first in the commission at the Old Bailey sessions, was entitled to grant the exclusive right of publishing the sessions' papers. So also, the evidence taken at a court-martial may be ordered to be published, although impeaching the conduct of the prosecutor; *Jekyll v. Moore* (b), *Home v. Lord William Bentinck* (c). In *Greenwood v. Prist* (d), it was held that a calumnious statement, by a person in the pulpit, made *bonâ fide*, was not actionable. *Cutler v. Dixon* (e) decided that an action would not lie for exhibiting articles of the peace, although calumnious, nor for libellous words in affidavits, *Astley v. Young* (f); nor for communications made *bonâ fide*, without any purpose of slander, *Cleaver v. Sarraude* (g); or in matters wherein the party had an interest, *Fairman v. Ives* (h), *Captain Baillie's case* (i). So also if a man is charged in a court of justice with forgery, or other crimes, though falsely, no action lies; *Beauchamps v. Croft* (k), *Buckley v. Wood* (l); nor for a calumnious advertisement published *bonâ fide* to obtain information; *Delany v. Jones* (m). In *Blackburn v. Blackburn* (n), where a letter, impeaching the character of a minister of an Independent congregation, was held libellous, it clearly would not have been so if the statement had been made *bonâ fide*.

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To shew that there is not always a remedy for a loss,

(a) Cited in *Millar v. Taylor*,
4 Burr. 2329.

(b) 2 N. R. 341.

(c) 2 B. & B. 130.

(d) Cro. Jac. 91, cited 13 St.
Tr. 1387.

(e) 4 Rep. 14 b.

(f) 2 Burr. 807.

(g) Cited 1 Camp. 268.

(h) 5 B. & Ald. 642.

(i) 21 How. St. Tr. 1.

(k) Dy. 285 a.

(l) 4 Rep. 14 b.

(m) 4 Esp. 191.

(n) 4 Bing. 395.

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Stockdale v. Onwhyn (a) may be referred to, where it was held that no action would lie for pirating a scandalous book. On the same ground it was held that the expenses of printing such a book could not be recovered; *Poplett v. Stockdale* (b).

As to proof being required of the exercise of the privilege by the House of Commons, the judgment of *Wilmot* C. J., in *Rex v. Almon* (c), may be referred to. Application was there made to the King's Bench, for publishing a libel on the Court, and his lordship said, "the power which the Courts of Westminster Hall have of vindicating their own authority is coeval with their first foundation." The same principles will be found in *Beaumont v. Barrett* (d), where it was held by the Privy Council that the power of punishing contempts was inherent in every legislative assembly.

No authorities are to be found the other way. In *Rex v. Lord Abingdon* (e), it was held, most properly, that a peer was not justified in publishing a speech spoken in parliament. He did so without the order of the House, and evidently with the view of calumniating an individual. So in *Rex v. Creevey* (f), where the defendant published a speech, spoken in the House of Commons, without the order of the House, the Court held it to be unauthorized, and libellous. The next case is *Stockdale v. Hansard* (g), tried in 1837. In that case, Lord *Denman* C. J. certainly did express a strong opinion as to the privilege in question. But as the record contained in that case a plea of justification as well as of not guilty, and a perfect defence under the justification was established, the counsel were not prepared to argue the great constitutional question, and did little more than cite *Rex v. Wright* (h). As so little discussion was then gone into, the question may be considered *res integra*.

(a) 2 C. & P. 146; 5 B & C.
173.

(b) 2 C. & P. 198.

(c) Wilm. Opin. & Judg. 254.

(d) 1 Moore's P. C. Rep. 59.


(e) 1 Esp. 226.

(f) 1 M. & S. 273.

(g) 7 C. & P. 731.

(h) 8 T. R. 293.

The Report of the Committee of the House of Commons on the question has been published since the decision of that case, and may be referred to as an authority on the point. That committee comprised not only the greatest statesmen of the day (*a*), but lawyers of the highest eminence in the profession. This committee was unanimous, with the exception of Sir *Robert Inglis*, that the privilege existed.

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An improper reference has been made to the oaths of the judges, as if their oaths required them to decide against privilege. Their oaths require them duly to administer the law, and if privilege be part of that law, it would be according to their oaths that this privilege should be respected.

The advice given by Lord *Bacon C.*, to a judge of the Common Pleas, when sworn in before him, may be referred to: "That you contain the jurisdiction of the Court within the ancient merestones, without removing the mark (*b*)."
 There are also memorable words of Lord *Tenterden C. J.* on the subject, in *Ex parte Cowan (c)*, when this Court was applied to for a prohibition to the Lord Chancellor sitting in bankruptcy: "We wish not to be understood as giving any sanction to the supposed authority of the Court to direct a prohibition to the Lord Chancellor sitting in bankruptcy. If ever the question shall arise, the Court, whose assistance may be invoked to correct the excess of jurisdiction in another, will take care not to exceed its own."

Curwood, at the close of the Attorney-General's argument, applied for time till the following morning to make his reply.

(*a*) The Select Committee consisted of Lord *Howick*, Sir *Robert Peel*, Mr. *Attorney-General*, Mr. *C. W. Williams Wynn*, Mr. *Tancred*, Sir *W. W. Follett*, Mr. *Charles P. Villiers*, Sir *Frederick Pollock*, Mr. *Roebuck*, Lord *Stanley*, Sir

George Strickland, Sir *R. H. Inglis*, Mr. *Serjt. Wilde*, Sir *George Clerk*, and Mr. *O'Connell*.

(*b*) 4 *Bacon's Works*, 508, ed. 1803.

(*c*) 3 *B. & Ald.* 130.

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Lord DENMAN C. J.—You may have till the next term for your reply. I see that, in *Burdett v. Abbot* (a), the plaintiff's counsel was heard in Hilary term, the Attorney-General was heard in Easter term, and the Court gave judgment, after a reply, on the same day that the Attorney-General was heard. I observe that the plea does not state exactly when the Resolution of the House of Commons passed; it appears, in fact, that it was come to on the 30th May, 1837, whereas the declaration is dated May 13th.

Sir J. Campbell A. G. It is stated under a videlicet. The facts are, that the Report of the Committee was made on the 8th May, before the present action had been heard of, but it was not taken into the consideration of the House till the 30th May. In the interval the action was brought.

Tuesday,
May 28th.

Reply.

Question is,
whether H. of
Commons can
make law.

Curwood in reply (b). Notwithstanding the vast body of authorities cited on the other side, most of which are inapplicable, the question recurs, whether a resolution of the House of Commons is to overturn the existing law of the land. The insignificance of the plaintiff is quite immaterial. The Habeas Corpus Act arose from the oppression of a mean individual. The ship-money question was raised by a case relating only to a few shillings. As to the personal weight of the members of the committee of the House of Commons, it will have no influence with the Court.

It is admitted that, when the law of Parliament comes incidentally before the Court, it must decide upon it, and yet it is alleged that the Court is totally ignorant of that law. With regard to the cases cited, those only are worthy of attention which were decided in times of quiet, when no bias could be attributed to the judges. In the earlier times,

(a) 14 East, 1.

judgment delivered in Trinity term

(b) The reply was made and following.

the House of Commons did not claim to decide on their privileges, but petitioned the king and obtained an act of the legislature, *Larkes' case* (a). When the whole legislature decided, then indeed, and then only, the law of Parliament is to be found. By degrees, the House of Commons claimed more privileges as they gained more power, and assumed the right of legislating. So far as they employed this power in resisting oppression, they were sanctioned by public opinion. But wherever they trenched upon public rights they have been defeated, as in *Ashby v. White* (b), and *Wilkes's case* (c). The assumption of privilege has been ably pointed out by Lord *Brougham* (d), who shews that the Lord Chancellor and Courts of Law will take cognizance of the question, what is or is not privilege. If the law of Parliament is part of the law of the land, the Court is bound to take notice of it, as of other portions of the law. The fallacy running through the whole argument on the other side is this, that the privileges of the House of Commons are assumed to be equivalent to the power of the legislature. *Thorp's case* (e) is perpetually relied upon, but the Court of Parliament there referred to, is described in the 4 *Inst.* as consisting of king, lords, and commons. If the argument from Sir *Robert Atkyns* is correct, that the law of Parliament, which is inherent in the legislature, is inherent in every part of it, it would follow that each branch of the legislature might make laws by itself. The cases of *Tresilian* and *Belknap*, and others of the same kind, were cited apparently to terrify the Court. Allusions were also made to a popular judge, as being an odious and pernicious character. It may be observed also, that a popular king may be the same, as *Hen. 8* gained his popularity by hanging his father's attorney and solicitor-

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Power of H.
of Commons
gained by
usurpation.

(a) 1 Hats. 17.

(b) 2 Ld. Raym. 938.

(c) 2 Wils. 151; 16 Parl. Hist. 546, 580.

(d) 4 Ld. Brougham's Speeches,

344. The passage from Lord *Brougham* was here read, on which the Attorney-General had commented.

(e) 1 Hats. 28.

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H. of Com-
mons not a
court of exclu-
sive jurisdic-
tion.

general. *Rex v. Williams* (a) is given up as an authority, because it was decided in times of political faction. All cases decided in similar periods should be treated in the same way.

An argument has been founded on the analogy of Courts which have an exclusive jurisdiction, and it is acknowledged in such cases that other Courts cannot interfere. But the House of Commons is not a Court of exclusive jurisdiction at all in cases between individuals. It may be said to be not even a Court of Justice; it cannot examine witnesses upon oath, and does not possess the functions of a Court. It is fully admitted that the cases of commitment by the House of Commons for contempt are not examinable by the Courts of Law; but that is on the principle, that every Court has cognizance of contempt against itself. But even this power has its limits, as Lord Holt held in *Regina v. Paty* (b), that if the contempt was alleged to be for bringing an action, the Court might interfere; and even Lord Kenyon held, in *Rex v. Wright* (c), that there might be cases in which the Court would take cognizance. So Lord Ellenborough, in *Burdett v. Abbot* (d), said, "if it clearly appeared from the warrant, that the House of Commons had acted illegally, I do not say that the Court would not interfere." It is fully admitted, however, that if the House choose to commit for a contempt, and do not express the cause in the warrant, they are at liberty to do so unquestioned. Whether the law ought to be so, is another question.

No distinction
between privi-
lege arising
directly or
incidentally.

It is said, that Courts of Law may take cognizance of privilege when the question arises incidentally, but not when it arises directly. But it is impossible to draw the distinction. The Court is bound to decide on the question whenever it comes before them judicially.

The Bill of Rights gives no sanction to any thing done out of Parliament; a warrant signed by the Speaker in Parlia-

(a) 13 How. St. Tr. 1369.

(c) 8 T. R. 293.

(b) 2 Ld. Raym. 1105.


(d) 14 East, 128.

ment may protect him, but it would not necessarily protect the officer for anything done on it out of Parliament. It is also said, that if this Court may take cognizance of the law of privilege, so also may the county court. But this argument applies to every question. The expediency of the practice is enlarged upon. But if it be expedient that the people should be informed of what is passing in Parliament, the legislature is bound to publish nothing but what is correct.

The reason why actions have not been brought for such publications is obvious ; individuals have naturally been reluctant to combat so powerful a body as the House of Commons. The practice of parliamentary publication does not go farther back than 1640-1, and it is not till 1836 that publication on the present extended scale has been adopted.

The report has also been justified as a confidential communication. But *Rex v. Lord Abingdon (a)*, and *Rex v. Creevey (b)*, destroy this doctrine. This report is as to the state of the gaol of Newgate, but what have the people of Great Britain to do with that gaol?

If the argument of the Attorney-General is correct, it goes to the extent that the House of Commons may make laws. *Hawkins*, and other text writers, feeling this, have said, that it is not to be presumed the House of Commons will ever carry that power to that extent. *Junius* remarks upon this, that *Hawkins* was a good lawyer but no statesman. The instances of abuse previously cited need not be repeated, but there is one instance which goes further than all the rest. A member's servant was committed as the father of a bastard ; the House of Commons held he was entitled to privilege of Parliament, and a discussion ensued whether he or the constable was to pay the costs (c). The instance of a citizen being committed by the House of Lords for calling the badge of a swan, on a nobleman's waterman, a goose, is well known.

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 Reply.

Abuse of
 power.

(a) 1 Esp. 226.

(b) 1 Mau. & S. 273.

(c) 1 Com. Jour. 438, 440-1.

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Another consequence of this fallacious argument is, that if each branch of the legislature may declare the law, different laws may be declared, and the question then will be, which is the law? This was the case in *Shirley v. Fagg* (a), and might happen again. In *Beaumont v. Barrett* (b), it was decided that the legislature of Jamaica might commit for a contempt, but if the Attorney-General is correct in his argument, they may also publish libels with impunity, and full liberty be given to the slave owners in that island of saying what they pleased.

LORD DENMAN C. J.—This case is of such importance that we do not think it proper to give an immediate judgment. We may deliver our judgment on the next paper day.

Cur. adv. vult.

Friday,
May 31st.

Judgment.

On the following Friday accordingly, (May 31st) the judgment of the Court was delivered by their lordships *seriatim*.

LORD DENMAN C. J.—This was an action for a publication defaming the plaintiff's character, by imputing that he had published an obscene libel.

The plea was, that the Inspectors of Prisons made a report to the Secretary of State, in which improper books were said to be permitted in the prison of Newgate: that the Court of Aldermen wrote an answer to that part of the report, and the inspectors replied, repeating the statement, and adding, that the improper books were published by the plaintiff: that all these documents were printed by, and under orders from the House of Commons, who had come to a resolution to publish and sell all the papers they should print for the use of Members, and who also resolved, declared and adjudged, that the power of publishing such of their reports, votes and proceedings, as they thought conducive to the public interest, is an *essential incident* to the

(a) 6 How. St. Tr. 1121.

(b) 1 Moore's P. C. Rep. 59.

due performance of the functions of Parliament, more *especially* of the House of Commons, as representing a portion of it.

The plea, it is contended, establishes a good defence to the action on various grounds.

I. The grievance complained of appears to be an act done by order of the House of Commons, a Court superior to any Court of Law, and none of whose proceedings are to be questioned in any way. This principle the learned counsel for the defendant repeatedly avowed in his long and laboured argument; but it does not appear to be put forward in its simple terms in the report that was published by a former House of Commons. It is a claim for an arbitrary power to authorize the commission of any act whatever, on behalf of a body, which in the same argument is admitted not to be the supreme power in the State. The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law or place any one beyond its control. The proposition is therefore wholly untenable, and abhorrent to the first principles of the constitution of England.

II. The next defence involved in this plea is, that the defendants committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges. This last proposition requires to be first considered. For if the Attorney-General was right in contending, as he did more than once in express terms, that the House of Commons, by claiming anything as its privilege, thereby makes it a matter of privilege, and also, that its own decision upon its own claim is binding and conclusive, then plainly this Court cannot proceed in any inquiry into the matter, and

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has nothing else to do but declare the claim well founded, because it has been made.

This is the form in which I understand the Committee of a late House of Commons to have asserted the privileges of both Houses of Parliament; and we are informed that a large majority of that House adopted the assertion. It is not without the utmost respect and deference that I proceed to examine what has been promulgated by such high authority. Most willingly would I decline to enter upon an inquiry which may lead to my differing from that great and powerful assembly; but when one of my fellow-subjects presents himself before me in this Court, demanding justice for an injury, it is not at my option to grant or withhold redress: I am bound to afford it if the law declares him entitled to it. I must then ascertain how the law stands, and, whatever defence may be made for the wrong-doer, I must examine its validity. The learned counsel for the defendants contends for his legal right to be protected against all consequences of acting under an order issued by the House of Commons, in conformity with what that House asserts to be its privilege; nor can I avoid then the question, whether the defendants possess that legal right or not.

Parliament is said to be supreme; I most fully acknowledge its supremacy. It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said, that the privilege of each House is the privilege of the whole Parliament. In one sense I agree to this, because whatever impedes the proper action of either, impedes those functions which are necessary for the performance of their joint duties. All the essential parts of a machine must be in order, before it can work at all. But it by no means follows, that the opinion that either House may entertain of the extent of its own privileges is correct, or its declaration of them binding. In the course of the argument, the privileges of the Commons were said to belong to them for their protection against encroachment by

the Lords. The fact of an attempt at encroachment may then be imagined, and we must also suppose, that the Commons would resist it. In such a case, the claims set up by the two Houses being inconsistent, both could not be well founded, and an instance would occur of adverse opinions and declarations, while the real privilege, whenever it is ascertained, would certainly be the inherent right of parliament itself.

The argument here became historical; and we were told that, at the early period when *privilege was settled*, the three estates assembled, and embracing all the power of the state, never would have left their privileges at the mercy of a very inferior tribunal, especially when the king's judges were dependent on the crown and removable at its pleasure. I cannot accede to the inference. If, in those early times, the Lords and Commons had felt the enlightened jealousy of dependent judges, which is here supposed, they would not have left them in that state of dependence, equally dangerous to the character of the judges, and to the just rights of themselves and of all their constituents. But we have no proof whatever of the constitution of this country being framed on abstract principles; there cannot be a doubt that it adapted itself to the exigencies of the several occasions that arose, and gradually grew into that form which the ends of good government require.

But while I dispute the fact of privileges being settled in the Aula Regia, or any other supposed constituent assembly, on any given principle, or indeed at all, I am far from believing that the judges ever had, or ought to have, by law, the smallest power over Parliament or either House of Parliament. The independence of Parliament is the corner-stone of our free constitution. The judges who invaded it, in the reign of *James the First* and his son, have justly shared with those who betrayed the rights of the people, in the case of ship-money, the abhorrence of all enlightened men. But a mean submissiveness to power has not been always confined to the judges; the same disposi-

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tions belonged to Parliament itself, and to both Houses. When we remember the sentence pronounced against an unfortunate gentleman of the name of *Floyde* (a), for a supposed offence, if it were one, against King *James the First* speaking of his daughter and son-in-law, we shall allow the two Houses had as little sense of independence as justice. The Commons resolved, declared, and adjudged that his fortune should be confiscated, his body tortured, his name degraded, and himself imprisoned for life. Lords rebuked the invasion of their privileges of punishment for which the Commons humbly apologized; but the sentence was carried into full effect. And can any one believe that these two Houses, thus vying in obsequiousness and cruelty, could entertain just views on the constitution and independence of Parliament.

Another reason for denying to the Courts of Law power in matters of privilege was said to flow from the same supposed ancient jealousy of the Lords. "The Commons never would have tolerated such an inquiry, because the decision might then have come to be reviewed on appeal by the co-ordinate and rival assembly." Yet the Attorney-General informed us, almost in the same breath, that the appellate jurisdiction of the Lords was of recent date, that it originally belonged to the whole Parliament and that it was long warmly contested with adverse decisions of privilege by the House of Commons.

The case of *Burdett v. Abbot* (b), in 1810, was an act brought against the Speaker himself, for an act done by him in Parliament, by order of the House of Commons. The plaintiff questioned his right, and, by seeking redress in the Court, eventually submitted their privilege to the decision of the House of Lords. At this very moment, the defendants, as acting by order of the House of Commons, sought our judgment in this question of privilege, and the House of Commons instructs the Attorney-General to appear

(a) 2 How. St. Tr. 1158.

(b) 14 East, 1.

their counsel before us. He tells us, indeed, that we can only decide in their favour; but, if we do, the House of Lords may reverse that judgment next week. Such is the practice of the nineteenth century: yet we are gravely told that, in the dark ages of our history, the Commons were too enlightened to allow any discussion of their privileges in any Court whose judgment may be questioned in the Lords.

But it is said, that the Courts of Law must be excluded from all interference with transactions in which the name of privilege has been mentioned, because they have no means of informing themselves what these privileges are. They are well known, it seems, to the two Houses, and to every member of them, as long as he continues a member, but the knowledge is as incommunicable as the privileges to all beyond that pale. It might be presumptuous to ask, how this knowledge may be obtained, had not the Attorney-General read to us all he had to urge on the subject from works accessible to all and familiar to every man of education. The argument here seems to run in a circle. The Courts cannot be entrusted with any matter connected with privilege, because they know nothing about privilege; and this ignorance must be perpetual, because the law has taken such matters out of their cognizance.

The old text writers, indeed, affirm the law and custom of Parliament, although a part of the *lex terræ*, to be *ab omnibus quæsitæ a multis ignorata*. This and other phrases repeated in the law books have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense. Lord *Holt* (a) in terms denied this presumption of ignorance, and asserted the right and duty of the Courts to know the law of Parliament, because the law of the land, on which they are bound to decide. Other judges, without directly asserting the proposition, have constantly acted upon it, and it was distinctly admitted by the Attorney-General in the course of his argument.

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(a) *Regina v. Paty*, 2 Ld. Raym. 1114-5.

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I do not know to whom he alluded as disputing the existence of any parliamentary privilege. No such opinion has come under my notice. That Parliament enjoys privileges of the most important character, no person capable of the least reflection can doubt for a moment. Some are common to both Houses, some peculiar to each; all are essential to the discharge of their functions. If they were not the fruit of deliberation in *Aula Regia*, they rest on the stronger ground of a necessity, which became apparent at least as soon as the two Houses took their present position in the state.

Thus the privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen *Elizabeth*, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable, and universally acknowledged. By consequence, whatever is done within the walls of either assembly, must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a Court of justice. But, if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher: So if the Speaker, by authority of the House, order an illegal act, though that authority shall exempt *him* from question, his order shall no more justify the person who executes it, than King *Charles's* warrant for levying ship-money could justify his revenue officer.

The privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution. But however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known

than this limitation of it. Though the party should deserve the severest penalties, yet his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every Court in Westminster Hall, and every judge of all the Courts, would be bound to discharge him by habeas corpus.

Nothing is more undoubted than the exclusive privilege of the people's representatives in respect to grants of money and the imposition of taxes; but, if their care of a branch of it should induce a vote that their messenger should forcibly enter and inspect the cellars of all residents in London possessing more than a certain income, and if some citizen should bring an action of trespass, has any lawyer yet said, that the Speaker's warrant would justify the breaking and entering? The Commons of England are not invested with more of power and dignity by their legislative character, than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt. We freely admit them in all their extent and variety. But, if on a resolution of guilt, voted by themselves, this grand inquest should not accuse but condemn, should mistake their right of initiating a charge for the privilege of passing sentence and awarding execution, will it be denied that their agent would incur the guilt of murder? I will speak but of one other privilege, the privilege from personal arrest, which is both undoubted and indispensable. A distinction has been sometimes taken, but in my opinion does not exist in law, between one class of Privileges, as necessary for performing the functions of Parliament, and another as a personal boon. Both classes are, as I apprehend, conferred on grounds of public policy alone. The proceedings of Parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of the members. In early times their very horses and servants might require protection from seizure under legal process,

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as necessary to secure their own attendance (a); but, when this privilege was strained to the intolerable length of preventing the service of legal process or the progress of a cause once commenced against any member, during the sitting of Parliament, or of threatening any who should commit the smallest trespass upon a member's land, though in assertion of a clear right, as breakers of the privilege of Parliament, these monstrous abuses might have called for the interference of the law, and compelled the Courts of justice to take a part. Suppose, then, in the celebrated case of Admiral *Griffin* (a), that one who claimed a right of fishing in his ponds, had brought an action here against the officer who seized him, who justified the imprisonment under the Speaker's warrant, alleging his high contempt in daring to fish in a member's pond, near Plymouth, would not the Court of Queen's Bench have been bound to inquire as to the privilege, and to declare that it did not and could not extend to such a case?

I desire to put the further question, whether the decision of such cases could be at all varied by the House declaring, with whatever of solemnity or menace, that it was the ancient and undoubted privilege of Parliament to do each and every one of the abusive acts enumerated?

Examples might be multiplied without limit. But the examples are said to be abuses, and to prove nothing against the use. It is also urged that abuse is not to be presumed, that the only appeal lies to public opinion, and that outrages like these would authorize resistance and amount to a dissolution of the government. I answer, that cases of abuse must be supposed to test the truth of the principle now under discussion. I say, further, that it is only in cases of abuse that the principle is required; that, though the maxim be true, *ab abusu ad usum non valet consequentia*, it cannot apply where an abuse is directly charged and offered to be proved; that no presumption can be made against a fact established or admitted. Need I go on to add, that the

(a) 28 Comm. Journ. 489—545.

appeal to public opinion, however successful, comes too late after the injury has been effected; and that to talk to an innocent sufferer of his right to consider the social compact as broken towards him, to throw off his allegiance and resist the outrage perpetrated in the name of Parliament, is language at least novel in a Court of Law?

We were, however, pressed with numerous authorities which were supposed to establish that questions of privilege are in no case examinable at law. *Thorp's Case* (a) was, as usual, first cited. The facts were, that the Lords in *Edward the Fourth's* time consulted the judges respecting the privilege then claimed by a member of the Commons' House; and the judges at first declined to answer,—facts totally inconsistent with an anterior settlement of parliamentary privilege, especially on the footing of the jealousy felt by the Commons towards the Lords and the judicial authorities. The judges did ultimately waive their objection to declaring an opinion on a question of privilege; they declared it in Parliament, and by Parliament it was adopted. Yet their reluctance to assume, in the first instance, the delicate office of interfering with the privilege of Parliament, even at the request of the House of Lords, and the respectful and submissive language in which they, the interpreters of the law, avowed their deference to those who make it, has been construed into a judicial decision that in their own Courts they would decline to enforce that very law when made, if either House of Parliament should obstruct and overbear it by setting up the most preposterous claim under the name of privilege. Often, undoubtedly, similar expressions have fallen from the judges, but they must be modified by the cases in which they occurred. A sentence from Chief Justice *North's* judgment, in *Barnardiston v. Soame* (b), was read at the bar. The question being, whether an action on the case lay against the sheriff at common law for a double return of members of parliament, which he strongly denied,

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(a) 1 Hats. 28; 13 Rep. 63.

(b) 6 How. St. Tr. 1109.

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he said, in the course of his elaborate argument, "If we shall allow general remedies (as an action upon the case is) to be applied to cases relating to the Parliament, we shall at last include privilege of Parliament, and that great privilege of judging of their own privileges." These words appear, at first sight, of extensive import indeed; but when we refer them to the subject then in hand, which was an action against a sheriff for his conduct in a parliamentary election, we shall perceive that they are far from making the large concession supposed.

The right of determining the election of their own members is one of the peculiar privileges of the assembled Commons, like all other proceedings for their own internal regulation. With respect to them, I freely admit that the Courts have no right to interfere, nor perhaps any regular means of obtaining information. How they must deal with such points, when actually brought before them, is another consideration. But the possible inconvenience that might arise from permitting the action against the sheriff, if the Courts should come into conflict with Parliament in those points of unquestionable privilege, in which Parliament must have the sole power of declaring what its privilege is, furnishes no shadow of an argument for the proposition, that whatever subject either House declares matter of privilege instantly becomes such, to the exclusion of all inquiry by the Courts.

We were also reminded of the disparaging terms applied by the judges to their own authority, when *Alexander Murray*, in 1751, was brought before this Court by *habeas corpus* (a). I have obtained a copy of the return, setting out a commitment by the House of Commons for a contempt in general terms; but it is not unworthy of remark, that *Forster J.* founds his judgment on what was said by Lord *Holt*, and treats it as a commitment for a contempt in the face of the House. The fact was so, but the return did not state it. And Lord *Ellenborough* observed, in *Burdett v. Abbot* (b),

(a) 1 Wils. 299.

(b) 14 East, 111, 148.

that *Holt* did not so limit the power of commitment for contempts.

Twenty years later, *Brass Crosby*, lord mayor of London, brought himself before the Court of Common Pleas by *habeas corpus* (a). The lieutenant of the Tower returned, for the cause of his imprisonment, an adjudication by the House of Commons, "That the lord mayor being a member of the House, having signed a warrant for the commitment of a messenger of the House for having executed a warrant of the Speaker issued by order of the House, was guilty of a breach of privilege of the House." The lord mayor had manifestly committed a breach of privilege: the grounds of it are fully set out in the Speaker's warrant. Nothing could therefore be less needful or less judicial than the wide assertion of privilege that was volunteered by the chief justice. Yet, after all that he said respecting the indefinite powers of Parliament, his decision rests on the simple ground that all courts have power to commit for contempt.

Sir *William Blackstone* clearly shewed, on the same occasion, that the return was good, on acknowledged principles of law, and declared the power then exercised to be one which "the House of Commons only possesses in common with the Courts of Westminster Hall." But it must be confessed, that his remarks on the state of public feeling rather evince the spirit of a political partisan, than the calmness and independence which become the judicial seat.

We know now, as a matter of history, that the House of Commons was at that time engaged, in unison with the crown, in assailing the just rights of the people; yet that learned judge proclaimed his unqualified resolution to uphold the House of Commons, even though it should have abused its power; rebuked the murmur and complaint which its proceedings had justly excited; deprecated as the last of misfortunes, and in terms which might lead to a supposition that he was at liberty to withdraw from it, a contest between the Courts of Justice and either House of Parliament; and

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(a) 3 Wils. 188; S. C. 2 W. Bl. 754.

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Lord *Kenyon* felt this, and denied the existence of such a power, adding, "I do *not* say that cases may not be put in which we would inquire whether the House of Commons were justified in any particular measure." We cannot fail to see that the one sentence is in direct contradiction to the other. The latter puts an end to the claim to authorize any act without the agents being subjected to any inquiry. It equally overthrows that doctrine of the subordination of Courts, which would condemn the first criminal tribunal of England to silence and submission, if either House should unhappily be induced to give their warrant to a crime.

Lord *Kenyon* supposes a case in which the Court "would undoubtedly pay no attention to an injunction from the House of Commons;" and he seems to think the case too enormous to have been ever possible. "If, for instance, they were to send their serjeant-at-arms to arrest a counsel here who was arguing a case between two individuals, or to grant an injunction to stay proceedings here in a common action." Yet these enormities, too gross to be thought possible, were the daily proceedings of the House of Commons in former times; nay, they fall short of the truth; not only did that great assembly, in *Charles* the Second's time, placard Westminster Hall with injunctions to barristers (some of Lord *Kenyon*'s most illustrious predecessors) against daring to appear in the discharge of their duty to their clients, but they sent their serjeant-at-arms to arrest and imprison counsel, solicitors, and parties who had violated their privileges, by presuming to appear at the bar of the highest court of appeal in the country. They may not have granted their formal injunction to stay proceedings in a common action, but they constantly decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body.

If Lord *Kenyon* had been chief justice in the days of Sir *John Fagg* and Dr. *Shirley* (a), and either of them had sued

(a) 6 How. St. Tr. 1121.

Out his writ of habeas corpus before him, and had appeared to be in Newgate for the offence of submitting his case to be argued in the House of Lords, it is plain that he would have inquired whether the House was justified in that particular measure, and would have restored the prisoners to freedom. Yet their resolution "was a proceeding of one branch of the legislature—a proceeding of those who, by the constitution, were the guardians of the liberties of the subject."

This inconsistency in a person of Lord *Kenyon's* wonderful acuteness, as well as other inaccuracies hereafter to be noticed, make one regret that the judgment in this case, like those before whom *Murray* and *Crosby* had been brought, was not more deliberately prepared. It was given on the instant, not in a full Court, not after hearing both sides. It bears marks of haste, and, we cannot deny, of the excitement and inflammation which belonged to the extraordinary times in which it occurred.

I do not pretend to discuss at length the particulars of every case in which the doctrine of privilege is asserted; but two of paramount magnitude and importance cannot be passed over. Sir *W. Williams* (a) was prosecuted, by ex-officio information, for an order signed by him as Speaker, authorizing the publication and sale of *Dangerfield's* Narrative, being a slanderous libel on *James Duke of York*, four years after that order had been given. His trial did not come on till the duke had ascended the throne; he pleaded to the jurisdiction of the Court, and that plea is admitted to have been properly overruled. He then pleaded as a justification the order of the House of Commons, and that plea was set aside without argument. He was fined 10,000/., and afterwards the fine was reduced to 8000/.. He never questioned this sentence, nor has it been reversed by any Court, or by act of parliament; on the contrary, Lord *Kenyon*, in the case last under discussion, appears to me to have considered it as good law; but, at the moment, his memory, in general so faithful, misled him as to the facts. He said

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(a) 13 How. St. Tr. 1369.


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“ the publication was the paper of a private individual, and, under pretence of the sanction of the House of Commons, an individual published.” Now, though the Narrative was indeed the paper of a private individual, it was adopted by the House, who ordered its publication. The Speaker did not publish as an individual, nor under pretence of their sanction, but as Speaker, and by their direct command. It was therefore an act done in Parliament. The proceeding was by consequence a breach of the fundamental privilege, which exempts all that is there done from question. The affair was taken up by the Convention Parliament; the Bill of Rights refers to it; the judgment would probably have been reversed by Parliament, like the attainders of *Russell and Sidney*, if the bill introduced for that purpose had not contained a most iniquitous provision for reimbursing the sufferer out of the estates of the Attorney-General, which caused its rejection by the Lords.

Even if this case were not bad law, it would be worthy of the severest censure,—a prosecution by the Crown of a single Member of Parliament for the misdeed of all, commenced years after,—the defence indecently scouted from the Court without a hearing, and the conviction followed by an excessive heavy penalty. But in what respect can it be said to bear the least analogy to the present case? The Speaker is not here sued; the sale of the present libel is not by the Speaker, nor took place within the walls of Parliament. If any officer of the House had been held innocent in disseminating that mass of atrocious falsehood, if any bookseller had been held justified in selling it, because the Speaker ordered that it should be sold for the benefit of the libeller, that would have been indeed a case in point. But I find in 3 Mod. p. 68, that *Dangerfield* himself had been convicted and punished for this same publication, and of that sentence I do not find that the legality, any more than the justice, has ever been challenged. Yet it is plain that the Speaker's order, under the authority of the House, would have been as good a justification to him for publishing, as the resolution of the House can now be to the present de-

pendant. These two cases afford the true distinction. *The King v. Williams* (a) was ill decided, because he was questioned for what he did by order of the House, within the walls of Parliament. *The King v. Dangerfield* (b) is undoubted law, because he sold and published beyond the walls of Parliament, under an order to do what was unlawful.

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Lord Shaftesbury (a), in the 29th of Charles the Second, sought his discharge from imprisonment in the Tower on an order of the Lords Spiritual and Temporal to keep him and two other Lords in safe custody “during his Majesty’s pleasure and the pleasure of this House, for their high contempt committed against this House.” The return was open to serious objections, as may be seen in the long arguments reported at page 144 of 1st Mod. Of the three Judges who remanded the Earl, one said “that the return, made by an ordinary court of justice, would have been ill and uncertain, but would not say what would be the consequences as to that imprisonment if the Session were determined.” The second said, “the return no doubt is illegal, but the question is on a point of jurisdiction, whether it may be examined here? This Court cannot intermeddle with the transactions of the High Court of Peers in Parliament during the Session; therefore the certainty or uncertainty of the return is not material, for it is not examinable here; but if the Session had been determined, I should be of opinion that he ought to be discharged.” And the third, the Chief Justice, thought “the Court had no jurisdiction,” for reasons unconnected with the continuance of the Session. It is strange that the duration of the Session, on which the judgments turn so much, is now held to be immaterial when the Lords commit.

This decision, which undeniably, and *à fortiori*, would give a sanction to many later ones, and many dicta touching privilege, which arose on habeas corpus, is cited by Lord Ellenborough in *Burdett v. Abbot* (d) without a comment.

(a) 13 How. St. Tr. 1369.

(b) 3 Mod. 68.

(c) 6 How. St. Tr. 1269.

(d) 14 East, 147.

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In *The King v. Flower* (a), allusion is made to it by Lord Kenyon, without considering its authority in point of law. Mr. Justice Holroyd, when arguing Sir Francis Burdett's case at the bar, distinguished between that action, in which the nature of the contempt appeared in the plea, and the return to the habeas corpus, stating the contempt in general terms: he distinguished also between an action and the proceeding by habeas corpus. One feature of *Shaftesbury's* case is curious, though not perfectly singular. The very proceedings of the House of Lords to which the Court of King's Bench yielded entire acquiescence, were condemned by the same House, 19th November 1680, as "contrary to the freedom of Parliament, derogatory to the authority of Parliament, and of evil example to posterity (b)." The order and proceedings were thereupon adjudged "unparliamentary from the beginning and in the whole progress thereof and therefore were all ordered to be vacated, that the same or any of them may never be drawn into precedent for the future."

In the same manner, after Lord Camden and the Court of Common Pleas had held Mr. *Wilkes* entitled to his release from custody before his trial on an indictment for libel, by reason of his privilege as Member of Parliament, the House of Commons came to a vote, that themselves possessed no such privilege (c). By which authority in such cases should we be bound? By that of our own law books, our daily guides, which, however, would appear to refer us to the Journals, or by that of the Journals of the House, in which the *Lex et Consuetudo Parliamenti* are treasured, but which are supposed to be hidden from our view? I think the Attorney-General referred us to the latter, of which he had before assured us that we were ignorant. Yet in *Shaftesbury's* case, these Journals would overturn the authority of the Court. So in the Middlesex election contests between *Wilkes* and *Luttrell*, it is notorious that the law of Parliament was laid down in the most opposite

(a) 8 T. R. 314.

(c) 15 Parl. Hist. 1362.

(b) 6 How. St. Tr. 1310.

sense on different occasions by the House of Commons. But, as to these proceedings by habeas corpus, it may be enough to say that the present is not of that class, and that when any such may come before us, we will deal with it as in our judgment the law may appear to require.

The Attorney-General told us of another case in point in his favour, *Burdett v. Abbot* (a). We must then examine that case fully. The plaintiff committed a breach of privilege by the publication of a libel; the defendant, the Speaker, stating that fact on the face of his warrant, committed him, by order of the House, to prison. An action was brought for this assault and false imprisonment. Did the House of Commons threaten the plaintiff, or his attorney or counsel, for a contempt of their privileges? On the contrary, by an express vote, they directed their highest officer to plead and submit himself to the jurisdiction of this Court. When the suit was pending, did they entertain questions on the course of the proceedings, or resolve that they alone could define their own privileges, or declare that judges, who should presume to form an opinion at variance with theirs, should be amenable to their displeasure? They suffered the cause to make the usual progress through its stages, and placed their arguments before the Court. Their arguments were just; their conduct had been lawful in every respect. The Court gave judgment in the Speaker's favour. The grounds of the decision were, not that all acts done by their authority were beyond the reach of inquiry, or that all which they called privilege was privilege and sacred from the intrusion of law, but that they had acted in exercise of a known and needful privilege, in strict conformity with the law.

Let us now see what was acknowledged by the Court to be the privilege of the House of Commons. Lord *Ellenborough*, almost on opening his luminous commentary on all the learning so profusely poured out in the discussion, claims for the High Court of Parliament, and each of the Houses of which it consists, "that authority of punishing summarily for contempts, which is acknowledged to belong,

(a) 14 East, 1.

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and is daily exercised as *belonging to every superior Court of Law*, of less dignity undoubtedly than itself" (a). This is the position established by him. The nucleus of Mr. Justice Bayley's careful argument is in these few words:— "The House of Commons has not only a legislative character, but is also a Court of judicature." "If then the House be a Court of judicature, it must have the power of supporting its own dignity as essential to itself, and without the power of committing for contempts, it cannot support its own dignity" (b). Sir Vicary Gibbs, the Attorney-General, who argued for the defendant, took the same ground of justification. (P. 85.) It were "easy to show that every Court in Westminster Hall has the same power of commitment for contempts, and that they could not long exist without such power. If, then, the right exist in the Courts of Westminster Hall, upon what principle, it might then have been asked, would it be contended that the same right did not exist, and in the same degree, in the House of Commons?" (P. 86.) Such was the principle on which the Exchequer Chamber affirmed the judgment; and the question proposed by Lord Eldon, in the House of Lords, to the judges, before that tribunal of the last resort pronounced in favour of the House of Commons, confines it in the same manner (c). The decision manifestly rests on the privilege to punish for contempts, inherent, no doubt, in Parliament, and in each House, whether regarded in the legislative or in the judicial capacity, but which it only possesses in common with the Courts of justice, and which was there exercised within the strictest bounds of the common law.

This great case, solemnly argued at the bar, and on both sides with extraordinary learning and power, and in which the Court evidently pursued their own inquiries in the interval between the arguments, presents a striking contrast to the rash and unmeasured language employed by former


(a) 14 East, 138.

(c) 4 Taunt. 101.

(b) 14 East, 159.

(d) 5 Dow, 199.

judges in *ex parte* proceedings, as writs of habeas corpus, and motions for criminal information. Lord *Ellenborough* and Mr. Justice *Bayley* carefully guard themselves against adopting such expressions, the former dissenting directly from Chief Justice *De Grey*, the latter quoting, without dissent, the doctrine laid down by *Holt* in *The Queen v. Paty* (a). With the same freedom Lord *Ellenborough* commented, in *The King v. Creevey* (b), on Lord *Kenyon's* dicta, in *The King v. Wright* (c). To the assertion that the Courts have always acquiesced in the unlimited claim of privilege, I have already stated enough to authorize me in opposing the contrary assertion. I proceed to prove its truth in other instances. The phrases which I have selected for remark out of the cases cited are the exception, not the rule. From early times, the spirit of English judicature has been more free and independent. Numerous cases were cited in the argument for the plaintiff, in *Burdett v. Abbot* (d), not required for the decision, except as they removed the preliminary obstacle to all discussion. They have been repeated in able tracts; most of them were criticised by the Attorney-General. He sought, and successfully in some, to show that the question of privilege, under the circumstances, did not arise. But they are not cited for their circumstances; their use is to show that the Courts exercised the right of examining matters supposed to be protected from their inquiry by privilege of Parliament. For this purpose, it is enough to enumerate, in the words of *Prynne* (e), "the cases of *Larke, Thorp, Clerke, Hyde, Attwyl, Walsh, Cosin, Ferrers*, and *Trewynyard*, which (he says) the Chief Justice vouched and insisted on in his learned argument, to the great satisfaction of the gentlemen of the long robe, and most auditors then present, as well members of the Commons' House of Parliament as others." *Cook's* (f), *Pledall's* (g), and others might be added.

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(a) 2 Ld. Raym. 1115.

(b) 1 Mau. & S. 273.

(c) 8 T. R. 293.

(d) 14 East, 1.

(e) *Prynne's Reg.* Part 4, 815.

(f) 1 Hats. 96.

(g) Cited 14 East, 47.

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The *Duchess of Somerset's* case (a), *Fitzharris's* (b), and others not necessary to be named, were of later date. The chief justice, thus eulogized by *Prynne*, was Sir *Orlando Bridgman*, delivering the judgment of the Court in *Benyon v. Evelyn* (c), who brings this result out of his examination of ancient authorities: "That resolutions or resolves of either House of Parliament, singly, in the absence of parties concerned, are not so concludent upon Courts of Law, but that we may, nay (with due respect, nevertheless, had to their resolves and resolutions) we *must* give our judgment, according as we, upon our oath, conceive the law to be, though our opinions fall out to be contrary to those resolutions or votes of either House." That Chief Justice *Bridgman* took upon himself to decide on privilege is so clear from his own plain words, that the opinion of *Holt*, in *Ashby v. White* (d), and of *Holroyd*, in arguing *Burdett v. Abbot* (e), cannot make us more certain of the fact. The Attorney-General does not deny the proposition, but would parry its effect, by shewing that the circumstances appearing there raised no question of privilege, and that what he was pleased to style the parade of learning on the subject was misapplied. But the judge avowed his right and duty; if he invaded privilege of Parliament by laying down doctrines inconsistent with it, the invasion could not be less culpable because uncalled for by the cause in hand.

The next case to which I advert in truth embraced no question of privilege whatever; but as one of the highest authorities in the State has thought otherwise, I shall offer some comments upon it—I mean *Jay v. Topham* (f). The House of Commons ordered the defendant, their serjeant-at-arms, to imprison the plaintiff for having dared to exercise the common right of all Englishmen, of presenting a petition to the King on the state of public affairs, at a time when no Parliament existed. For this imprisonment an action was

(a) *Prynne's Reg.* Part 4, 1214.(d) 2 *Ld. Raym.* 938.(b) 8 *How. St. Tr.* 223.(e) 14 *East*, 49.(c) *O. Bridg. Judg.* 324.(f) 12 *How. St. Tr.* 821.

brought. The declaration complained not only of the personal trespass, but also of extortion of the plaintiff's money practised by defendant under colour of the Speaker's warrant. The plea of justification under that warrant, which could not possibly authorize the extortion, even if it could the arrest, was overruled by this Court, no doubt with the utmost propriety, for the law was clear. Lord *Ellenborough* points this out in the most forcible manner, 14 *East*, 109. Yet for this righteous judgment Chief Justice *Pemberton* and one of his brethren was summoned before the Convention Parliament, when they vindicated their conduct by unanswerable reasoning, but were, notwithstanding, committed to the prison of Newgate for the remainder of the session. Our respect and gratitude to the Convention Parliament ought not to blind us to the fact, that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King *James* of his crown. It gave me real pain to hear the Attorney-General contend that the two judges merited the foul indignity they underwent, as they had acted corruptly in concert with the Duke of York. In support of this novel charge, he produced no evidence, nor any other reason but that the plea, as set out in *Nelson's Abridgment* (a), appears to have been in bar and not to the jurisdiction. But the Commons, who knew their own motives, made no such charge; the record produced there, on which the judges were said to have violated the law, exhibits a bad plea, for the reasons assigned by Lord *Ellenborough*; and the judgment punished by the Commons, could not have been different without a desertion of duty by the judges.

We have arrived at the Revolution, in which *Holt* took a conspicuous part. He owed to it the seat which he filled with such unrivalled reputation. On three several occasions he found himself compelled to deal with questions of privilege, and on all he gave his judgment against the claim. I shall not dwell minutely on *Knollys's* case (b), where he with

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(a) 2 Nels. Abr. 1248.

(b) 12 How. St. Tr. 1167.

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the whole Court came to a different conclusion from the House of Lords, as to the supposed Earl of *Banbury's* right to that title. The Attorney-General asserted that that was no question of privilege, but merely whether an individual was a Peer or not. One might have supposed that the issue, whether one claiming to be a Member of either House of Parliament was such or not, had some relation to parliamentary privilege, especially when the restraint of his person on a criminal charge was involved in that question.

The Lords considered it matter of privilege, and questioned the judges. But the matter, it seems, had not been formally referred to the House of Lords, and was not duly brought before them. They had, however, formally given judgment, and of that the Court was informed. How could the Court know that the Lords had proceeded extra-judicially, if utterly ignorant of parliamentary matters, or be permitted to inquire into those methods of proceeding, if their own subordinate station estopped them from questioning any act done by the paramount authority of a House of Parliament?

Without further pressing *Knollys's* case (a), I confess it was not without difficulty that I could trust the evidence of my own senses, when the Attorney-General set aside the authority of *Ashby v. White* (b), by declaring that it was not a question of parliamentary privilege. If not, the three Judges who differed from the Chief Justice were strangely deceived; the Chief Justice himself misapprehended both their reasoning and his own; the House of Lords was mistaken in their view of the subject, when they adopted the Chief Justice's opinion against that of his three brethren; and the House of Commons was most of all ignorant of the truth, when (17th January 1704 (c), three days after the Lords had reversed the judgment of the Queen's Bench) being "informed that there had been an extraordinary judgment given in the House of Lords, upon a writ of error from the Queen's Bench, in a cause between *Matthew Ashby* and *William White*,

(a) 12 How. St. Tr. 1167.

(c) 14 How. St. Tr. 696.

(b) 2 Ld. Raym. 938.

wherein the privileges of the House were concerned," they brought the proceedings before them, and, after great debate, resolved that "*Ashby* having, in contempt of the jurisdiction of the House, commenced such action, was guilty of a breach of their privileges, and that whoever should presume to do the like, and all attornies, solicitors, counsellors, serjeants-at-law, soliciting, prosecuting, or pleading in any such case, are guilty of a high breach of the privileges of this House." The Lords, after full inquiry by a committee, resolved, on the other hand, that the declaring *Matthew Ashby* guilty of a breach of the privileges of the House of Commons, for prosecuting an action against the constable of Aylesbury for not receiving his vote at an election, after he had in the known and proper methods of law obtained a judgment in Parliament for the recovery of his damages, is an unprecedented attempt upon the jurisdiction of Parliament, and is, in effect, to subject the law of England to the votes of the House of Commons" (a).

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And now we are gravely informed that this case concerned not the privileges of Parliament. If, however, the opinion of all the Judges, and of both Houses, and of all historians and all lawyers, till that assertion was made, be correct, then that case decided that the Courts of Law were not bound by the opinion of the Commons' House on matters of election, whereupon they claimed the sole right of judging, and had actually given judgment, but that the law must take its course as if no such judgment had been given by the House of Commons, and no such privilege claimed. On this point the decision has never, to my knowledge, been impugned in any of our Courts: Lord Mansfield is supposed to have dissented from it (b), but his doubt applies to the form of declaration merely; and his own practice at the bar (c), of asking leave of the House of Commons to commence such actions, proves only his cautious desire to avoid and avert from his clients the doom denounced against *Ashby*, *Paty*,

(a) 14 How. St. Tr. 799.

East, 59, n.

(b) See *Milwood v. Serjeant*, 14

(c) Ib. 60, n.

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and their brother burgesses and others, in *pari delicto*, their counsel and attornies.

In their case, commonly designated as the *Case of the Men of Aylesbury* (a), a question of the utmost difficulty and importance was brought before the same chief justice and the Court of Queen's Bench. The House of Commons, acting on the resolution just cited, pronounced those persons guilty of the breach of privilege there prohibited, and sent them to Newgate for a contempt in bringing their action. They sued out their habeas corpus. *Holt*, in judgment of the highest excellence, gave such reasons for restoring them to liberty, as it is easier to outvote than answer; the other three judges thought the adjudication of the House of Commons, on a contempt brought before them, could not be gainsayed in that proceeding. The judges of the other Courts are understood to have concurred with the majority in the Queen's Bench; and the opinion just cited must be taken as that of eleven judges against one; but the other eight could only have stated their first impression, without publicity, and without hearing the argument.

There is no satisfaction in dwelling on the angry contest between the two Houses which ensued. The peculiarity of the circumstances leaves a doubt whether the law can be considered as settled by what then occurred. But even supposing that this Court would be bound to remand a prisoner committed by the House for a contempt, however insufficient the cause set out on the return, that could only be in consequence of the House having jurisdiction to decide upon contempts. In this case we are not trying the right of a subject to be set free from imprisonment for contempt, but whether the order of the House of Commons is of power to protect a wrong-doer against making reparation to the injured man.

When the judges were supposed to have unanimously agreed to surrender their right of examining whatever ma-

(a) *Regina v. Paty*, 2 *Ld. Ray.* 1105; *S. C.* 14 *How. St. Tr.* 849.

have been done by authority of Parliament, some very important declarations by some of the most eminent among them must have been forgotten. Lord Chief Justice *Willes* avowed the contrary resolution: "I declare for myself that I will never be bound by any determination of the House of Commons against bringing an action at common law for a false or double return, and a party may proceed in Westminster Hall notwithstanding any order of the House."

Wynne v. Middleton (a).

What was said by Lord *Mansfield* in the House of Lords, respecting the privileges of the other House in the Middlesex election, is the more weighty, because he was then upholding the privilege of the latter in election matters. (Parliamentary History, Vol. 16, 653.) "Declarations of the law (said he), made by either House of Parliament, were always attended with bad effects; he had constantly opposed them whenever he had an opportunity, and, in his judicial capacity, thought himself bound never to pay the least regard to them." He exemplified this remark by reference to general warrants; "although thoroughly convinced of their illegality, which indeed, naming no persons, were no warrants at all, he was sorry to see the House of Commons, by their vote, declare them to be illegal; it looked like a legislative act, which yet had no force or effect as a law; for supposing the House had declared them to be legal, the Courts in Westminster would nevertheless have been bound to declare the contrary, and consequently throw a disrespect on the vote of the House. He made a wide distinction between general declarations of law, and the particular decision which might be made by either House in their judicial capacity, on a case coming regularly before them, and properly the subject of their jurisdiction. Here," that is, in a case of election, "they did not act as legislators pronouncing abstractedly and generally what the law was, and for the direction of others, but as judges drawing the law from the several sources from which it ought to be drawn for their own

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(d) 1 Wils. 128.

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guidance in deciding the particular question before them and applying it strictly to the decision of that question."

The dispute between the two Houses in 1784, when the Commons issued a kind of mandate to the Treasury, to suspend the payment of certain bills, till the House should further direct, was, in fact, a struggle between the two great parties in the country. The Lords, by a large majority, condemned that proceeding, and resolved (as the same House had almost in the corresponding terms resolved in 1704, at the close of the *Aylesbury* case), "That an attempt in one branch of the legislature to suspend the execution of the law, by separately assuming to itself the direction of a discretionary power, which by an act of parliament is vested in any body of men, to be exercised as they shall deem expedient, is unconstitutional (a)." The doctrine was enlarged upon by Lord *Thurlow*, who spoke of the resolutions of the House of Commons in terms preserved by tradition, which there might be impropriety in repeating. The Commons defended their resolution by asserting, that in fact it did not fairly bear the import ascribed to it. Lords *Mansfield* and *Loughborough* took the same line in answering Lord *Thurlow*, both fully admitting with him, that the Commons have no power to suspend the law by their resolutions. The former said that, "For either branch of the legislature to attempt to suspend the execution of the law, was undoubtedly unconstitutional." "It had been stated, as a ground for voting it, that the House of Commons had come to a resolution militating against a clause of the 21st of the present King. What then? A resolution of the House of Commons would not suspend the law of the land. A resolution of the House of Commons, ordering a judgment to be given in any particular manner, would not be binding in the Courts of Westminster Hall." Nor can I refrain from quoting the characteristic burst of sentiment with which Lord *Erskine* remarked, in 1810, on some censure cast on Sir *F. Burdett*, for appealing to the law against the legality of the Speaker's warrant: "No man would more zealously

(a) 24 Parl. Hist. 497.

defend the privileges of Parliament, or of either House of Parliament, than he should, and he admitted, that what either branch of the legislature had been for the course of ages exercising, with the acquiescence of the whole legislature, would, in the absence of statutes, be evidence of the common law of Parliament, and, as such, of the common law of the land. The jurisdiction of Courts rested in a great measure upon the same foundation; but besides that these precedents, as applicable alike to all of them, were matters of grave and deliberate consideration, they were and must be determined in the end by the law." "The contrary was insisted upon by the Commons, when they committed Lord Chief Justice *Pemberton* for holding plea of them in his Court; but so far was he from considering such a claim as matter of argument under this government of law, that I say, advisedly," said his lordship, "that if upon the present occasion, a similar attack was made upon my noble and learned friend (Lord *Ellenborough*) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and bones, and blood." "Why was any danger" "to be anticipated by a sober appeal to the judgment of the laws?" "If the judges had no jurisdiction over the privileges of the House of Commons; they would say they had no jurisdiction. If they thought they had, they would give a just decision according to the facts and circumstances of the case, whatever they might be (a)."

After these decisions in our Courts, and these strong and vehement declarations of opinion by some of the greatest luminaries of the law, it is too much to seek to tie our hands by the authority of all our predecessors.

On Lord *Brougham's* judgment in the case of Mr. *Long Wellesley*, lately published by himself (b), and reported also in *2 Mylne and Russell*, 639—660, for obvious reasons, I shall observe but shortly. He adopted, in its fullest terms, the resolution expressed by Chief Justice *Willes* (c), and carried

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(a) 16 Cobb. Parl. Deb. 851.

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(b) Speeches of Lord *Brougham*,

(c) 1 Wils. 128.

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it no further, though his form of expression is perhaps more striking and forcible. "If, instead of justly and temperately and wisely abandoning this monstrous claim, I had found a unanimous resolution of the House in its favour, I should still—(and it is this which made me interpose to assure the learned counsel that I needed not the Resolution of the House of Commons in favour of the Court of Chancery)—I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law." A declaration the more remarkable, as proceeding from a judge long known as the champion of all popular rights, the jealous asserter of all the real privileges of that assembly, where his station and his services may be thought to place his name on a level at least with the greatest of all those, either lawyers or statesmen, who have come after him upon the same stage.

It is indeed true that that avowal of opinion was no more necessary for the decision, than perhaps the discussion of Chief Justice *Bridgman* and the declared resolution of Chief Justice *Willes*. But would that circumstance render the sentiment less offensive, if it really assailed the independence and dignity of the House of Commons? Quite the contrary. Yet there was no committee, no resolution, no menace.

Two admissions were made by the Attorney-General in the course of his argument here, either of which appears to me fatal to his case. He very distinctly recognised the words of Lord *Mansfield*, that, if either House of Parliament should think fit to declare the general law, that declaration is undoubtedly to be disregarded; adding, that it should be treated with contempt. Now such declaration would be a proceeding of the House, and so above all inquiry.

Again, if due subordination of the Courts is the guiding principle, the declaration, even if against law, by a superior Court, demands respect and deference, if not acquiescence. But the declaration of general law may arise in the course of an inquiry respecting privilege; the claim

advanced by the report of the committee is, that "the House is the sole and exclusive judge of the *extent* of its own privileges;" and the Attorney-General in the same spirit informed us on the part of the House of Commons, of his and their "confidence that when we should be informed that the act had been done in the exercise of a privilege, we should hold that we could no longer inquire into the matter." He warned us that, this being a question of privilege, we have no power to decide it, and told us that, whenever either House claims to act in exercise of a power which it claims, the question of privilege arises. But if the claim were to declare a general law, the Attorney-General agrees that no weight would belong to it. Clearly then the Court must inquire whether it be a matter of privilege or a declaration of general law; as indisputably, if it be a matter of general law, it cannot cease to be so, by being invested with the imposing title of privilege.

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The other concession to which I alluded is, that, when matter of privilege comes before the Courts, not directly, but incidentally, they may, because they must, decide it; otherwise, said the Attorney-General, there would be a failure of justice. And such has been the opinion even of those judges who have spoken with the most profound veneration of privilege. The rule is difficult of application. Lord *Ellenborough* and the Court, as well as the defendant's learned counsel, felt it to be so in *Burdett v. Abbot*(a). The learned report of the select committee states in direct terms, that they "have not been able to discover any satisfactory rule or test by which to ascertain in all cases whether the question of privilege would be deemed to arise *directly or incidentally*; there are many cases which might be decisively placed in the one class or the other, but there may be also very many which cannot be so assigned." "Your committee are of opinion that the Courts *have no jurisdiction* to decide upon privilege, either *directly or incidentally*, in any sense inconsistent with the

(a) 14 East, 1.

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independence and exclusive jurisdiction of Parliament. If such a jurisdiction did exist of deciding *incidentally* upon privilege, uncontrolled by Parliament, it would lead to proceedings as incongruous and as effectually destructive of the independence of Parliament as if the *direct* jurisdiction existed,—a consequence which, together with the extreme uncertainty of the extent of the rule, makes it indispensable necessary that it should be investigated (a).”

The report (a) seems to consider that the question of privilege arose *incidentally* in the former trial between the parties (b), and points out very serious inconveniences that may flow from according to Courts of Justice this power of deciding incidentally. The “opinion that the Courts have no jurisdiction to decide upon privilege either direct or incidentally” undergoes some apparent qualification by a reference to the *sense* in which the words are used. It appears that the Courts have “no such jurisdiction in any sense inconsistent with the exclusive jurisdiction of Parliament (a).” I would not venture to speak with absolute certainty of the meaning of this passage, but I imagine that a body which has no jurisdiction to act in any sense inconsistent with the exclusive jurisdiction of another body, can possess no jurisdiction at all. I think, then, it must be assumed, that the committee of the late House of Commons declared that the Courts have no jurisdiction whatever to decide even incidentally on any matter of privilege, their resolutions having reference to this preceding part of their report.

Now this power is denied to the Courts by this report for the first and only time. Even the appendix to it, which being published by the same authority, I know not well how to disjoin from it, returns to that same distinction between the direct and incidental occurrence of questions of privilege which the report and resolutions appear to repeal. It were to be wished that the late House of Com-

(a) Report from the Select Committee, &c. 8 May, 1857, p. 15.

(b) *Stockdale v. Hansard*, 7 & P. 731.

mons had laid down their rule for the guidance of the Courts in language less open to dispute as to its meaning, but we in this case must feel relieved from all embarrassment by the frank acknowledgment of the Attorney-General. If then we may be under the obligation of deciding on privilege, even though incidentally, it follows that we have some knowledge on the subject, or at least the means of obtaining knowledge. The report takes for granted that, if either House has actually come to a decision on the point thus raised, we should be bound to adhere to it; and the Attorney-General insisted that, even if in the present case the question did but arise incidentally, we should be bound by the declaration of the law set forth by the House, in any formal statement of its opinion.

Our duty would then be to interpret the law laid down by one House by discovering its meaning. But after ascertaining it as best we might from those stores of parliamentary learning, from which we are pronounced to be excluded, we might possibly find that the other House (or the same House at another time) had come to an opposite declaration. What course must we then take? How reconcile the discrepancy? Perhaps it may be said that the fact is not to be presumed. I agree that it is not; but it exists at this moment, with reference to the legal rights of parties in the matter that arose in *Ashby v. White*(a). This Court could not decide the matter either way, without overruling what has been laid down either by Lords or Commons, and thus violating the privileges of Parliament and rendering ourselves amenable to just displeasure.

But suppose an entirely new point to arise, and some party litigating here to set up a claim of privilege never heard of before, as to which therefore neither House had ever framed a resolution. Since then the Courts may give judgment on matters of privilege incidentally, it is plain that they must have the means of arriving at a correct conclusion, and that they may differ from the House of Par-

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(a) 2 Ld. Ray. 938.

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liament, as *Holt* and the Court of Queen's Bench differed from the Lords in the *Banbury* case (a), as he did in *Paty's* case (b); as the same and many other of the judges, as well as the Lords, did from the Commons in the case of *Ashby v. White* (c); and as I trust every Court in Westminster Hall would have done, if an order of either House, purporting to be made by virtue of the privilege of Parliament, had been brought before them as a justification for the imprisonment of a subject of this free state, for killing Lord *Galway's* rabbits or fishing in Admiral *Griffin's* pool.

In truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them to be done. The second proposition differs from the first in words only. In both cases the law would be superseded by one assembly; and however dignified and respectable that body, in whatever degree superior to all temptations of abusing their power, the power claimed is arbitrary and irresponsible, in itself the most monstrous and intolerable of all abuses.

Before I finally take leave of this head of the argument I will dispose of the notion, that the House of Commons is a separate Court, having exclusive jurisdiction over the subject-matter, on which, for that reason, its adjudication must be final. The argument placed the House herein on a level with the spiritual Courts, and the Court of Admiralty. Adopting this analogy, it appears to me to destroy the defence attempted to the present action. Where the subject-matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now inquiring whether the subject-matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer; it is perfectly clear that none of these

(a) 12 How. St. Tr. 1167.

(b) 2 Ld. Ray. 1105.

(c) 2 Ld. Ray. 938; S. C. 14
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Courts could give themselves jurisdiction, by adjudging that they enjoy it.

I come at length to consider whether this privilege of publication exists. The plea states the resolution of the House, that all parliamentary reports printed for the use of the House should be sold to the public, and that these several papers were ordered to be printed, not however stating that they were printed for the use of the House. It then sets forth the resolution and adjudication before set out. We know, by looking at the documents referred to at the bar, that this resolution and adjudication could not justify the libel complained of, because it was not, in fact, passed till after action brought. But passing over all minor objections, I assume that the defendants have properly pleaded a claim on the part of the House, to authorize the indiscriminate publication and sale of all such papers as the House may order to be printed for the use of its members.

The Attorney-General would preclude us from commencing this inquiry. He protests against our taking any other step than that of recording the judgment already given in the superior Court, and registering the edict which Mr. *Hansard* brings to our knowledge. But having convinced myself that the mere order of the House will not justify an act otherwise illegal, and that the simple declaration that that order is made in exercise of a privilege does not prove the privilege; it is no longer optional with me to decline or accept the office of deciding whether this privilege exist in law. If it does, the defendant's prayer must be granted, and judgment awarded in his favour; or if it does not, the plaintiff, under whatever disadvantage he may appear before us, has a right to obtain at our hands, as an English subject, the establishment of his lawful rights, and the means of enforcing them.

In the first place, I would observe, that the act of *selling* does not give the plaintiff any additional ground of action or right to redress at law beyond the act of publishing.

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The injury is precisely the same in its nature, whether the publication be for money or not, though it may be much more extensively injurious when scattered over the land for profit. But the direction to *sell* is highly important in this respect; that public *sale* necessarily imports indiscriminate publication beyond recall or control, and holds out the same authority as a protection to every subordinate vendor, who by purchase from their printer and bookseller, is, like him, doing no more than giving effect to an order of the House.

How far it is strictly constitutional for either House of Parliament to raise money by sale or otherwise, and apply it to objects not specified by act of parliament, might require consideration on general grounds, but does not belong to the present season or place, in which we have only to deal with the manner in which the mutual rights of the parties before us in this action are affected.

It is likewise fit to remark, that the defamatory matter has no bearing on any question in Parliament, or that could arise there. Whether the book found in the possession of a prisoner in Newgate were obscene or decent could have no influence in determining how prisons can best be regulated, still less could the irrelevant issue whether it was published by the plaintiff. The most advisable course of legislation on the subject is wholly unconnected with those facts; the inquisitorial functions would be exercised with equal freedom and intelligence, however they were found to be: and if the ascertainment of them by the House was a thing indifferent, still less could the publication of them to the world answer any one parliamentary purpose.

The proof of this privilege was grounded on three principles: necessity, practice, universal acquiescence. If the necessity can be made out, no more need be said; it is the foundation of every privilege of Parliament, and justifies all that it requires. But the promise to produce that proof ended in complete disappointment. It consisted altogether in first adopting the doctrine of *Lake v. King* (a),

(a) 1 Saund. 131.

that printing for the use of the members is lawful, and then rejecting the limitation which restricts it to their use. The reasoning is, "If you permit the number of copies to be as large as the number of members, the secret will not be confined to them." A strong appeal to justice and expediency against printing, even for the use of the members, what may escape from their hands to the injury of others, but surely none in point of law for throwing down the only barrier that guards the rest of the world against calumny and falsehood, founded on *ex parte* statements, made for the most part by persons interested in running down the character assailed.

The case just alluded to, drew a line in the nineteenth year of *Charles* the Second, which has always been thought correct in law. The defendant justified the libel he had printed by pleading that it was only printed for the use of the members. Much doubt at first existed whether the justification were good in law, the right of delivering copies for the use of the members of a committee being undisputed, but some of the judges questioning whether printing could be so justified. After an advisement of many terms, and even of some years, Lord *Hale* and the Court sustained the defence, because, being necessary to their functions, it was the known course in Parliament to print for the use of members. But wherefore all this delay and doubt if the House *then* claimed the privilege of authorizing the publication of all papers before them; or how can we believe that the defendant would not have pleaded at first that privilege, when we find that he was admitted to have acted according to the course and proceedings of Parliament, if it was then their understood right? This case occurred within a very few years of *Benyon v. Evelyn* (a), which must have excited the attention of the House, and made them vigilant in maintaining their privileges against improper interference from Courts of Law.

The supposed necessity soon dwindled, in the hands of the learned counsel, down to a very dubious kind of expe-

(a) O. Bridgm. 324.

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diency; for is it not much better, said he, that defamed, and thence avoided by mankind, should have been the victim of a privileged publication, than ignorant by what means he has lost his place in society. A question over which many a man might wish to answer before he answered it. It is far from certain that he, had he become acquainted with the fact, he might be able to do business, or abroad in the service of his country; but the discovery, when made, would bring him small comfort. It would shew him that his enemy was too strong to contend with, and that the door of legal redress must be closed against him for ever.

Another ground for the necessity of publishing all the papers printed by order of the House was that members might be able to justify themselves to their constituents, when their conduct in Parliament is arraigned, by appealing to documents printed by authority of the House. This is precisely the principle denied and condemned by Lord Ellenborough and the Court in *The King v. Crease*. A decision which it may now perhaps be convenient to regard as inconsistent with privilege, but which, founded on Lord Kenyon's authority in *The King v. Lord Abinger*, has been uniformly regarded till this time as a justification of the law. But indeed it is scarcely possible with ingenuity to fancy a case in which a member, accused of any misconduct in his trust, should be able to vindicate himself by resorting to such documents.

Then, on general grounds, the necessity of making parliamentary conduct of the members known to the constituents is urged, and the duty of the House of Commons to convey instruction to the people. The latter argument may be answered by asserting, that the duty of giving instruction resides in the whole legislature, and not in any single branch of it. The former argument proves much; for the conduct of the representative is best controlled by the share taken by him in the debates, which, from all time up to the present moment, have been no

(a) 1 Mau. & S. 273.

(b) 1 Esp. 226.

neither sold nor published by the House, but cannot be published by the most accurate reporter without his incurring the danger of Newgate for breach of privilege, and being exposed, without justification, to legal consequences. It can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is no doubt susceptible of improvement, but the improvement must be a legislative act. If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth and departing from our duty. And if, on such considerations, either House should claim, as matter of privilege, what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the Courts, though never, I hope, treated with contempt. It would also be the declaration of a new law; and the word "adjudge" can make no difference in the nature of the thing.

The practice or usage is the second ground on which the Attorney-General seeks to rest this privilege; and he has a warrant for his claim, which, if well-founded, is even stronger than any opinion of necessity. He refers to an act of parliament. The Postage Act (*a*), it seems, conveys all parliamentary proceedings to all parts of the empire free of expense: and forasmuch as, when that act passed, it was notorious that the votes and other proceedings contained matter criminating individuals; therefore it is argued, the legislature must have intended to circulate such criminating matter. But the same act requires newspapers to be circulated free of postage: it was equally notorious that newspapers often contained libels, yet it was never contended that the Postage Act intended to give impunity to their circulation. In both cases it is clear that the act merely gave untaxed circulation to such proceedings and such

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(a) 42 Geo. 3, c. 63.

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papers as it was before lawful to circulate, leaving all questions of what is lawful exactly in their former plight. . . But "the practice has prevailed from all time." If so, it is strange that no vestiges of it are tracked to an earlier period than 1640, when the House of Commons, acting neither in a legislative nor, an inquisitorial capacity, began to set up an authority independent of the Crown and, hostile to it, which led to its gradually absorbing all the powers of the state. For near twenty years, the House was taking this executive part, which they could not carry on but by publishing their votes and proceedings. At the Restoration they made some amends to the exiled King, by evincing their loyalty in the same manner, and their vows of allegiance and submission were also sold and published, as their manifestoes and levies of men and money against his father had been before. Thus does the practice appear to have originated in the Long Parliament, and to have been continued at the Restoration. The origin disproves the antiquity of the privilege, or its necessity for the functions of one of the three estates; no such necessity was thought of till one began to struggle against the other two for an ascendancy, which reduced them to nothing. True it is, the practice of so printing and publishing has proceeded with little interruption till this hour. But the question is not on the lawfulness or expediency of printing and publishing in general, it is whether any proof can be found of a practice to authorize the printing and publication of papers injurious to the character of a fellow-subject; such a privilege has never been either actually or virtually claimed by either House of Parliament; the notice of neither has been called to the fact of their giving publicity to writings of that character; what course they might have taken we cannot know, if a party thus injured had laid his grievance before them. Had their answer been, we claim the right to promulgate our judgment on cases within our jurisdiction, on which we have made inquisition, heard evidence and defence, and formed our judgment, they would have referred

to a state of things wholly different from that which is now before us. If they had said, we claim the privilege of ordering the printing of what we please, and of publishing all we print, however partial the statement, and however ruinous to individuals, the question of their right to justify the publisher would have been much the same as that which we have now under discussion.

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The *practice* of a ruling power in the state is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by *Hampden*: general warrants had been issued and enforced for centuries, before they were questioned in actions by *Wilkes* and his associates, who, by bringing them to the test of law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much; for the admitted and grossest abuses of privilege have never been questioned by suits in Westminster Hall. The most obvious reason is, that none could have commenced a suit of any kind for the purpose, without incurring the displeasure of the offended House, instantly enforced, if it happened to be sitting, and visiting all who had been concerned. During the session, it must be remembered, that privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law; while privilege, with one voice, accuses, condemns, and executes, and the order to "Take him," addressed to the Serjeant-at-Arms, may condemn the offenders to persecution and ruin. Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced a general persuasion that the privilege existed in point of law?

Besides, the acquiescence could only be that of individuals in particular hardships brought upon themselves by the proceedings published: we have a right to suppose that a considerate discretion was fairly applied to the particular circumstances of each case; that few things of a dispa-

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raging nature were printed at all; that where criminating votes were allowed to meet the public eye, they were justified as an exercise of jurisdiction upon matters properly brought before Parliament, after patient hearing and candid inquiry; that the imputations were generally true, and actions for libel would only have made them more public; and that, even where *ex parte* proceedings were printed, to the annoyance of private persons, that minute suffering would be lost sight of in the general sense of an overwhelming necessity.

All kinds of prudential considerations, therefore, conspired to deter from legal proceedings, and will fully account for the acquiescence; and the difference between the extent of publication formerly practised, and the uncontrolled sale of all that the House may choose to print, in order to raise a fund for paying its officers, cannot fail to strike every unbiassed understanding.

I must add, that the evidence on this subject set forth in the Report, convinces me that publication has never been by way of exercising any of its privileges, nor the fruit of deliberation to what extent it ought to be carried and within what bounds restrained. With very different objects the practice was originally introduced; it grew imperceptibly into a perquisite, and I venture to believe that it was raised into a traffic, and a means of levying money without much consideration.

The authority to which the Attorney-General last appealed is one to which particular attention is due; I mean the Report of the committee appointed by the late House of Commons to examine the subject. He spoke of it as a document of extraordinary weight, demanding the utmost respect, as uniting the suffrages of the most distinguished statesmen and the most eminent lawyers.

I feel just and high deference towards them all, towards none more than the learned person who pressed us with their authority, and whose argument at the bar so fully laid before us all that could possibly be urged in defence of their resolutions. That learned person gave us to under-

stand that he had sacrificed many weeks of his valuable time in studying this great subject, and that in preparing his argument he had become perfectly convinced that his side was the side of truth. He must forgive me the remark, that this conclusion would have affected me more if it had preceded instead of following the report of that committee and the trial at *Nisi Prius*, and indeed the resolution of 1835. He also felt it right to remind us that members of that committee, though not now occupying judicial station, are sure to do so hereafter; that their fame may eclipse all their predecessors upon the bench, and their opinion, embodied in the committee's report, ought to be as much venerated as if it had appeared some ages earlier, in the reign, he added, by way of example, of Queen Anne.

I fully accede to the suggestion, but, in acting upon it I could not refrain from considering the claims to confidence which the individual members might possess. My inquiry would not be confined to their learning and ability; I should ask of their habitual candour and love of truth, perhaps, too, of their political and personal connexions. I might be driven to the invidious necessity of comparison; finding that some lawyers in the House had dissented from the committee; if I had found also in the minority such names as adorn the list of those who opposed the claim of privilege in the case of *Ashby v. White* (a); in the reign referred to, it might be difficult, notwithstanding any disparity of numbers, to be quite certain which way the balance of authority inclined.

One thing would aid me in this estimate, whether the first impression of those most conversant with constitutional law coincided with the resolutions in which they afterwards concurred; for in many cases the first thoughts of understanding men are the best, and the surest to bear the stamp of truth; subsequent consideration sometimes brings expediency into competition with rectitude, and expediency of all kinds, general and particular, public and personal. But, on the other hand, it would not be unimportant to

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know, whether great lawyers, whose minds had not been particularly exercised in these matters, who might have been at first induced to concur in the resolutions, had one reason to abide by them on maturer reflection. Some may have yielded to the extensive claims of privilege admitted by judges, and asserted by great living authority, who might afterwards renounce them as inconsistent with clear principles of law in daily operation. But I have been led to farther observing on the authority of the report, against which the plaintiff is in truth appealing to our judgments, and on which nothing but the learned counsel's claim of deference to him could have tempted me to make a single remark. I can only add that, in its authority and force of reasoning, he appeared to the composers as conclusive, there might have been more propriety and more grace, in leaving them to their natural influence on our minds, than in resorting to language which would have exposed our motives to a darker suspicion than any pointed at by the Attorney General, in our opinion had happened to coincide with, that of the House of Commons. I drop a benignant and blower. I cannot conclude without some reference to the particular circumstances which have attended this cause in its progress, and have been observed upon by the Attorney General at the close of his long discourse. I then mentioned the suddenness with which this great subject came upon me, when the newspapers informed me that the issue which I was about to try, had been made the topic of discussion in the House of Commons the night before. I must now add that, when on the trial, it was proposed to make out a defence from the resolution so often cited, the resolution was unknown to me. The project of the honorable House to authorize the unrestricted sale of all the printed proceedings at so much a sheet, throwing off such a discount to wholesale purchasers, and appropriate the money to be raised to specific purposes, was what I have had anticipated, and (I own) could hardly believe, and thought it clear that such a course of proceeding could

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only be defended by asserting for one House of Parliament that sovereign power which is lodged in the three estates; an opinion confirmed by the report of the committee, by the Attorney-General's argument, and by the concurrence of my learned brethren.

Some degree of censure was insinuated on my immediate declaration of an opinion not absolutely necessary for disposing of the cause, and which was said to have encouraged the plaintiff to comment on this second action in the day before allowed to doubt the supposed consequence of the second action was brought three months later, and immediately after the report of the committee had appeared. Perhaps, by some dexterous dealing with the points that arose at Nisi Prius, it might have been possible to avoid the painful collision, but not without shrinking from my duty to those parties who, whether necessarily or not, brought this question before me, and had a right to my opinion upon it; not without a poor compromise of the sacred principles of constitutional freedom. Besides, the delay would have implied a doubt where none was entertained, and would have been but a short postponement of the evil day; for similar questions must have sprung up in other quarters; and must have brought under examination the large rights now claimed.

I had indulged a hope that the resolution might have undergone revision, and have been found such as the House of Commons would not wish to continue on its Journals. I had even some ground for believing that distinguished members of the committee itself entered upon the inquiry with opinions corresponding with my own; and I, for my own part, am at a loss to discover in their printed report, or in the argument I have heard, any good reason for their conversion. I cannot lament that I gave utterance, at the proper season, to sentiments of which I deeply felt the importance as well as the truth; nor can I doubt that a full consideration of the whole subject will lead to beneficial results. One thing alone I regret,—a warmth

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of expression in asserting what law and justice appeared to me to require, which may have rendered it more difficult for the late House of Commons to recede from any claim which it had advanced.

I am opinion, upon the whole case, that the defence pleaded is no defence in law, and that our judgment must be for the plaintiff on this demurrer.

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LITTLEDALE J.—The first question for our consideration is, whether the resolution of the House of Commons, that they have the power to do an act, precludes the Court from inquiring into the existence of the power; and whether we are in the situation of inquiring into this question at all, and whether we are not estopped by this resolution of the House of Commons, who have resolved, declared, and adjudged, “That the power of publishing such of its papers, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons’ House of Parliament, as the representative portion of it,” operates so as to estop this Court from proceeding to investigate the subject presented to the Court upon this demurrer.

It is said, the House of Commons is the sole judge of its own privileges; and so I admit, as far as the proceedings in the House, and some other things, are concerned; but I do not think it follows that they have a power to declare what their privileges are, so as to preclude inquiry whether what they declare are part of their privileges.

The Attorney-General admits that they are not entitled to create new privileges; but they declare this to be their privilege. But how are we to know that this is part of their privileges without inquiring into it, when no such privilege was ever declared before?

We must therefore be enabled to determine, whether it be part of their privileges or not. Suppose the House of Commons had resolved that they had a right to punish

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persons for an infringement on the property of members, as was declared in the case of Admiral Griffin, and also in other cases where claims of privilege have been set up, which are now abandoned by the Attorney-General, could it be contended that, if the House were now to resolve that these privileges belonged to them, this Court were estopped from inquiry into whether they were to be taken as part of the privileges?

Or, suppose that the House were to go much beyond what was formerly considered as privilege, and were to assert as privileges what, at the same time, I must admit the House of Commons is never likely to assert, is this Court to be shut out from inquiring into whether they have the privilege or not?

It is said that the proceedings in Courts, which have a peculiar jurisdiction of their own, and where the mode of proceeding is different from ours, cannot be inquired into in the Common Law Courts, as in the case of judgments and matters only cognizable in the Ecclesiastical Courts, and in the Admiralty Courts, and that, therefore, as the House of Commons is exclusively the judge of its own privileges, we cannot inquire into it. But the cases are not similar; the Ecclesiastical Courts and the Courts of Admiralty give judgments, or decide matters upon adverse claims of parties litigated in the Courts. But this proceeding in the House of Commons does not arise on adverse claims; there are no proceedings in the Court; there is no judge to decide between the litigant parties; and it is the House of Commons who are the only parties making a declaration of what they say belongs to them. If the House of Commons were to make an adjudication upon the discussion of a claim of litigant parties, on a subject within their jurisdiction, this Court would be bound by it.

If the House of Commons have the right to resolve what their privileges are, so as to estop the Courts of Common Law from inquiring further into the subject, and in a case like the present to give judgment, without more, for the

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defendants, the House of Lords have the same power; and I will suppose that, the House of Lords having the same inquiry to make as to the state of prisons under an act of parliament, and the very same reports and proceedings had been made to their House, as have been made to the House of Commons, and that the House of Lords had resolved that copies of the papers should be printed for the use of the members of the House of Lords, and had declared that no other copies should be printed; and supposing that upon the judgment now proposed by the Attorney-General to be given for the defendants, on the ground before-mentioned, and that the record came by writ of error before the House of Lords, would that House consider themselves estopped from inquiring into the matter by the resolution of the House of Commons? I will not pretend to say what they would do, but I cannot bring my mind to any other conclusion as to this part of the case, than that this Court is not necessarily bound by the mere assertion of the resolution of the privilege having been declared by the House of Commons, to give judgment for the defendants without further inquiry.

I would here make some remarks as to the mode in which the plea states the resolution of the House of Commons, as to the privilege:

“And the defendants further say, that the said Commons’ House of Parliament heretofore, to wit, on the 31st day of May, in the year last aforesaid, resolved, declared, and adjudged, that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interest, is an essential incident to the constitutional functions of Parliament, more especially to the Commons’ House of Parliament, as the representative portion of it.”

This plea states the fact of a resolution having been made by the House of Commons on the 31st day of May, 1837, which is after the day of the commencement of the action,

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as stated in the demurrer book, and also after the day of the declaration.

Now, if this was the averment of a new fact which had arisen after the commencement of the action, and it was a material fact to be introduced into the plea, it ought to be pleaded in bar of the further maintenance of the action, and not in bar of the action generally; but as this statement of the resolution is only a statement of what is the privilege of the House, and which privilege it is contended is coeval with the House of Commons, I do not think it is such an allegation of a new fact as to say that the plea should be confined to be a bar of the further maintenance of the action.

Another remark on the plea is, that the Resolution of the 13th of August, 1835, that the parliamentary papers printed by order of the House should be made accessible to the public by purchase, which includes all the papers printed; whereas the resolution of the 31st May, 1837, is only as to such papers as should be deemed necessary and conducive to the public interest, which is more limited than the former resolution, and implies a selection, and might seem to require that the selection should be made after the resolution.

But as the plea states that the paper which is the subject of this action had been ordered to be printed, that implies that the House thought it necessary and conducive to the public interest that it should be published.

I have made these remarks as to the technicality of the plea.

I will now consider whether the order of the House is a sufficient justification for the doing an act otherwise illegal, and whether the power does exist in this particular case.

I think that the mere statement that the act complained of was done by the authority of the House of Commons is not of itself, without more, sufficient to call at once for the judgment of the Court for the defendants.

The defendants have not pleaded to the jurisdiction of the Court, but have pleaded in bar generally, and so as to

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raise a question of law or of fact according as the plaintiff chooses. . . And I think that this Court is not estopped from investigating the question of law raised by the demurrer to the plea in this action. And I think we are to inquire whether the act of publication has any thing to do with the privileges of the House; and, if it has, then whether those privileges, connected with the authority given to the defendants, amount to a justification.

...In the case of *Burdett v. Abbot*(a), no question was made as to the Court being precluded from investigating the law of the case; they heard very long and laborious arguments, and gave judgment for the defendant. And so also we are at liberty here, and we are not shut out from hearing the arguments, and giving such judgment as we consider to be according to law.

...But it is said that the question of privilege of the House of Commons comes directly before the Court upon the pleadings, and that therefore upon all the authorities it is quite clear it is not competent to this Court to inquire into the question of privilege; and it is said that it is in effect the same case in principle as *Burdett v. Abbot*(a), and that it was there held, that the defence, being founded upon the order of the House to do the thing complained of, raised the question of privilege directly, and that the Court could not investigate the legality of that order.

But this differs very materially from *Burdett v. Abbot*(a). That was an action against the Speaker himself, for an act done by him in the House. The act done by him was to commit an individual whom the House adjudged to be guilty of a contempt to the House, and who had been for that ordered to be taken into custody, and there was a specific order of the House as to the particular thing to be done. But this case is altogether different; these defendants are not members of the House, but agents employed by them; the plaintiff is a perfect stranger to the House: he has been guilty of no insult or contempt of the House, and there is no order of the House applicable to him. He stands,

(a) 14 East, 1.

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therefore, in the situation of a stranger to the House, complaining of persons who are no members of the House, but merely employed to distribute their papers.

Lord *Ellenborough*, in the course of his judgment^(a), says that, independently of any precedents or recognized practice on the subject, such a body as the House of Commons must, *a priori*, be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions may be. But yet when he comes to the summing up the points for the consideration of the Court, and gives the first part of his judgment, he says:—First, that “it is made out that the power of the House of Commons to commit for contempt stands upon the ground of reason and necessity, independent of any positive authorities on the subject; but it is also made out by the evidence of usage and practice, by legislative sanction, and recognition by the Courts of Law, in a long course of well-established precedents and authorities.” Lord *Ellenborough*, therefore, takes into his consideration the reason and necessity of the order, as well as the evidence of usage and practice, and the legislative sanction and recognition by Courts of Law, in a long course of well-established precedents and authorities.

I admit that it is very difficult to draw the line between the question of privilege coming directly before the Court, and where it comes incidentally; the shades of difference run into one another. The decisions and dicta of the judges, who have said that the House of Commons are the only judges of their own privileges, and that the Courts of Common Law cannot be judges of the privileges of the House of Commons, are chiefly where the question has arisen on commitments for contempt, upon which no doubt could ever be entertained, but that the House are the only judges of what is a contempt to their House generally, or to some individual member of it; but no cause has occurred where the courts or judges have used any expressions to show that they are concluded by the resolution of the House

(a) 14 East, 138.

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of Commons in a case like the present. I think, therefore, that the Courts of Westminster Hall are not precluded from going into the inquiry from the decisions and dicta of judges. And I think that, when Lord Ellenborough summed up the reasons for his judgment in the way already pointed out in a case where it is alleged that the question of privilege came directly before the Court, we may follow his example, and endeavour to ascertain whether these resolutions of the House, on which the plea is founded, be founded on the reason and necessity of the order, as well as on evidence of the usage and practice of the legislative sanction and recognition of law in a long course of well established precedents and authorities.

After the very full and elaborate judgment of my Lord Denman, I do not think it necessary to go into the whole subject of privilege.

There is no doubt about the right, as exercised by the two Houses of Parliament, with regard to contempts or insults offered to the House, either within or without their walls; there is no doubt either as to the freedom of their members from arrest, nor of their right to summon witnesses, to require the production of papers and records, and the right of printing documents for the use of the members of the constituent body, and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge.

In the case of commitments for contempts there is no doubt but the House is the sole judge whether it is a contempt or not; and the Courts of Common Law will not inquire into it.

The greater part of these decisions and dicta, where the judges have said that the Houses of Parliament are the sole judges of their own privileges, have been where the question has arisen upon commitments for contempt, and as to which, as I have before remarked, no doubt can be entertained. But not only the two Houses of Parliament, but every Court in Westminster Hall, are themselves the sole judges whether it be a contempt or not; although, in cases where

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the Court did not profess to commit for a contempt, but for some matter which by no reasonable (intendment) could be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently unjust and contrary to law and natural justice. Lord *Edinburgh* says that, in the case of such a commitment, if it even should occur (but which he says he could not possibly anticipate as ever likely to occur), the Court must look at it, and act upon it as justice may require, from whatever Court it may profess to have proceeded.

I will confine my observations as to what is the more immediate subject of this record, viz. the printing and publishing of parliamentary papers.

There is no trace of printing parliamentary papers of any description prior to 1641, when there was a general resolution for printing the Votes of the House, and at subsequent times reports and miscellaneous papers were printed under special resolutions, and measures taken for their distribution through the country; and it appears that these various papers have, from time to time, been allowed to be sold.

Then it appears by the plea that there was a general resolution of the House in August 1885, that the papers which should be ordered to be printed should be sold, and the price was directed to be as low as possible.

The publication on which the action is founded, was ordered to be printed, and was published by the defendants, who were the printers appointed by the House of Commons to print their papers, and it is upon these orders and upon the resolution that the defence is founded.

Though the fact of any resolution for printing and distributing papers is not shown to have taken place at an earlier period than 1641, yet from the difficulty there may be in now finding records and documents of an earlier date, I cannot say but that they were printed before that time; the Votes were the first things ordered to be printed, but though the reports and miscellaneous parliamentary papers do not appear to have been printed till a later period, yet for the

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purposes of this argument I think they may be all classed together; and I think also that the resolution that they might be sold makes no difference in principle; for though the sale would cause a greater circulation, it is the distributing them to the country at large, whether by sale or gift, that raises the question.

The fact of the printing and distributing parliamentary papers, even had it existed long before the Conquest (when I say "printing," of course it is not appropriate language to the times before the introduction of printing), would of itself prove nothing as to privilege.

Parliament does not require any privilege to publish its own papers; any man may publish his own papers, but the only thing that can be called privilege is a right to publish defamatory papers amongst the general mass, which are to be distributed.

As a pure abstract universal statement of privilege, I think it cannot be supported; it can only be so under some qualifications.

These qualifications must necessarily be inquired into. The first case that occurs as to the publishing parliamentary papers of a defamatory nature was that of *Lake v. King* (a), where certain parliamentary papers had been printed which aspersed the character of Sir Edward Lake, who was vicar-general and principal official of the Bishop of Lincoln.

The defendant pleaded that he printed the papers in question for the use of the members of the House of Commons; and, on a demurrer to the plea, the Court held the plea good, because it was the order and course of proceeding in Parliament to print and deliver copies, &c. whereof they ought to take judicial notice.

This decision was quite correct, as it was a privileged publication.

The next case that occurs, as a case of litigation, is that of *The King v. Williams*, which is reported in 2 Shower, 471, and much more fully in the 13th volume of the octavo

(a) 1 Saund. 128.

edition of the State Trials, page 1370. It was an information against Sir William Williams, who was Speaker of the House of Commons, for printing and publishing a paper called *Dangerfield's Narrative*. He pleaded to the jurisdiction of the Court, that, this paper being signed by him as Speaker, by the order of the House of Commons, the Court of King's Bench had no jurisdiction over the matter.

On a demurrer to this plea, it was overruled, and he afterwards pleaded nearly the same facts as a plea in bar; this plea in bar appears to have been afterwards withdrawn, and he was fined a very considerable sum of money; it was afterwards considered, when a change took place in the government, a very harsh proceeding against the Speaker, and as being very much influenced by the politics of the times, and a bill was brought into Parliament to reverse the judgment obtained; but for some reason the bill was never finally passed, and the judgment remained as it was.

There is no doubt but the proceedings against Sir William Williams were very harsh and improper, but I am by no means prepared to say that, as the original plea was pleaded to the jurisdiction of the Court of King's Bench, and was not pleaded in bar, the judgment of the Court was wrong. But as to what one may consider the merits of the case with regard to Sir William Williams, if he had either pleaded not guilty, or a special plea in bar, which he had prosecuted to trial, I am not prepared to say but that he ought to have been acquitted, because the act of signing the order for printing the paper was done in the House of Commons by the order and authority of the House, and was therefore a proceeding in the House, and as such was a case of privilege which exempted him from both a criminal prosecution and an action.

I will now advert to the case of *The King v. Lord Abingdon* (a). That was an information against Lord Abingdon for a libel contained in a paragraph in the public newspapers, stated to be part of a speech delivered in the House of Lords.

(a) 1 Esp. 226.

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Lord Abingdon urged that, as the law and constitution allowed a member to state in the House facts or matters, however they might reflect on an individual, or charge him with any crimes or offences, never, and such was punishable by the law of Parliament, he from thence contended that he had a right to what he had a right to deliver, without punishment or censure.

Lord Kenyon said, "as to the words in question, had been spoken in the House of Lords, and confined to walls, that Court would have no jurisdiction to call Lordship before them, to answer for them as an offence, but that in the present case, the offence was the public under his authority and sanction, and at his expense."

I will next mention the case of *The King v. Wright*, which is considered as an authority for the defendants, was an application, by Mr. Horne Toke, for leave to criminal information against the defendant, for publishing a paragraph in the report of a committee of the House of Commons, imputing treasonable conduct to Mr. Toke.

The rule was refused; and Lord Kenyon says, "it is possible for us to admit that the proceedings of either the Houses is a libel; and yet that is to be taken as a foundation of this application."

He afterwards adds, "This is a proceeding by a branch of the Legislature, and therefore we cannot interfere with it." But Lord Kenyon does not admit the order of the House of Commons to be conclusive on all occasions; for he says, "I do not say that cases may not be in which we could not inquire, whether or not the House of Commons were justified in any particular measure."

Mr. Justice Lawrence assimilated the case to a publication of what took place in a Court of Justice. He says, "This case has been chiefly argued on two grounds. It is said that the report of the House of Commons is unjustifiable, inasmuch as it imputes a crime to the pr

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cutor, and deprives him of his privileges. It is said that this report charges him with being guilty of high treason, notwithstanding a verdict of the jury had ascertained his innocence, but that is not the full import of the paragraph. It is possible that a man may have views hostile to the government and constitution of the kingdom without being guilty of high treason, especially of the particular treason imputed to the persons there mentioned. It does not, therefore, follow that this report charges those persons with the same crime of which they had been before acquitted. But the chief ground taken by the prosecutor's counsel is, that though the report of the House of Commons cannot itself be considered as a libel, the defendant, not acting under the authority of the House, may be indicted for publishing it with a view to general circulation. It has been said that the publication of the proceedings of Courts of Justice, when reflecting on the character of an individual, is a libel; to support which proposition, the case of *Waterfield v. The Bishop of Chester* (a) has been cited upon which he makes some observations. Then he goes on to state: "The proceedings of Courts of Justice are daily published, some of which highly reflect on individuals; but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the Courts, but they are printed for the information of the public. Not many years ago an action was brought in the Court of Common Pleas, by Mr. Currie, against *Walter* (b), proprietor of *The Times*, for publishing a libel in the paper of *The Times*; which supposed libel consisted in merely stating a speech made by counsel in this Court, on a motion for leave to file a criminal information against Mr. Currie. Lord Chief Justice Eyre, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a

(a) 2 Mod. 118.

(b) 1 B. & P. 525.

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true account of what had passed in this Court. And in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue." He then adds; "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice shall be universally known.

The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to private persons whose conduct may be the subject of such proceedings. The same reasons also apply to proceedings in Parliament: it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated, and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller." Though, therefore, the defendant was not authorized by the House of Commons to publish the report in question, yet as he only published a true copy of it, Mr. Justice *Lawrence* stated that he was of opinion that the rule ought to be discharged.

It is to be observed that the strict expression of Lord *Kenyon* cannot be doubted for a moment, for he only says that it is impossible to admit that the proceeding in either House of Parliament is a libel, of which there is no doubt, for the proceeding itself certainly is not a libel. And with regard to Mr. Justice *Lawrence's* opinion as to the publication of the proceedings in a Court of Justice, the generality of his expressions is commented upon by other judges in subsequent cases, and does appear to admit of some qualification.

Then it is contended upon this case that, if the judges thought the publication was privileged, though unauthorized by the House of Commons, *à fortiori* it would be so

if it was so authorized. The case, as far as it goes, is certainly in favour of the defendants.

After that comes the case of *The King v. Creevey* (a). There the defendant published a speech which he had made in Parliament, reflecting upon the character of an individual.

Lord Ellenborough says, "How can this be considered as a proceeding of the Commons' House of Parliament? A member of that House spoke what he thought material, and what he was at liberty to speak in his character of a member of that House. So far he was privileged; but he has not stopped there, but, unauthorized by the House, has chosen to publish an account of that speech in what he was pleased to call a more corrected form, and in that publication has thrown out reflections injurious to the character of an individual."

The defendant was convicted, and upon an application to the Court for a new trial, Lord Ellenborough says:—

"If any doubt belonged to the question, I should be most anxious to grant the rule to shew cause, in order to have the grounds of doubt more fully discussed and settled. But as I cannot find any thing on which to found even a colour for argument, except what arises from an extravagant construction put on a particular expression of Lord Kenyon in the case of *Rex v. Wright* (b), it would be to excite doubts, and not to settle them, if we were to grant the rule. What Lord Kenyon there said was this, 'That it was impossible to admit that the proceedings of either House of Parliament was a libel, and yet that was to be taken as the foundation of the application made in that case.' I will not here wait to consider whether that could be distinctly called a proceeding in Parliament. What was printed for the use of the members was certainly a privileged publication, but I am not prepared to say, that to circulate a copy of that which was published for the use of the members, if it contained matter of an injurious ten-

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(a) 1 M. & S. 273.

(b) 8 T. R. 293.

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doubt, to the character of an individual, was legitimate, and could not be made the ground of prosecution. But the House of Commons hesitated to pronounce its proceedings in Parliament in the terms given to some of the judges in that case. But it is not necessary to say whether that be or not, because this does not range itself within the principles of that case. How can it be considered as a proceeding of the Commons? House of Parliament? A member of that House has spoken what he thought material, and what he was at liberty to speak in his character as a member of that House. So far he was privileged, but he has not stopped there; but unauthorized by the House, has chosen to publish in a public newspaper what he has been pleased to call a more corrected form, and in that publication has thrown out reflections injurious to the character of an individual. The only question is, whether the publication of that publication is not an inference of malice, arising from the matter. If it be, has he a right to retract these reflections to the public, and to address them as an equal to the public, in order to explain his conduct to his constituents? Here is no case in practice, nor I believe any proposition laid down by the best text-writers upon the subject, that tends to such a conclusion. The case of *Rex vs. Wright* (a), indeed determined that a proceeding in Parliament could not be deemed libellous; but that does not warrant a publication of it in every newspaper, as was held in *Rex vs. Lord Abinger* (b). As to *Wright* (c), it is not necessary for the present purpose to discuss that case. Whenever it becomes necessary, I shall say that the doctrine there laid down must be understood with very great limitations, and all persons fully assent to the unqualified terms attributed in the report of that case to Lord Chief Justice Eyre, in *the Duke of King* (d), the judgment of Lord Hale and of the other judges was founded upon this point, viz. that it

(a) 8 T. R. 293.

(c) 1 B. & P. 525.

(b) 1 Esp. 226.

(d) 1 Saund. 120, 131 a.

was the order and course of proceedings in Parliament to print and deliver copies, of which the Court ought to take judicial notice. In order, therefore, to bring this case within the rule in *Lake v. King* (a), we ought to find that it is the order and course of proceedings in Parliament that members should print their speeches; and that this Court will take judicial notice of such a course of proceedings. The very statement of the proposition is the whole of the case. It is therefore neither within *Lake v. King* (a), nor *Bar v. Wright* (b), giving to that case its full effect, and even if it were, perhaps the Court would lay down the doctrine with somewhat more limitation than has been found in that case. Mr. Justice Bayley says, "If the case admitted of any doubt, I should be desirous of granting a rule; but this is not the case without difficulty. A member of parliament has undoubtedly the privilege for the purpose of producing parliamentary effect to speak in Parliament boldly and clearly what he thinks conducive to the good of the country. He may even, for that purpose, if he thinks it right, cast imputations in Parliament against the character of any individual, and still he will be protected. But, if he is at perfect liberty to circulate those imputations elsewhere, the evil would be very extensive. No member, therefore, is at liberty so to do." In *Lake v. King* (a), such was the impression of the lawyers of that day. There the defendant did not justify the printing and delivering of the petition to divers subjects, not generally, but to divers subjects, being members of the committee appointed by the Commons, and such publication was held justifiable, because it was according to the order of proceedings of Parliament and their committee. But it is not contended to-day that it is according to the course and order of Parliament for members to communicate their speeches to the printers of newspapers in order to give them to the world in a more correct form. If any misrepresentation respecting them should go forth, there

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(a) 1 Saund. 120, 131 a.

(b) 8 T. R. 293.

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is a course perfectly familiar to all members, by which such misrepresentations may be set right, viz. by complaining to the House of the misrepresentation, and having the author of it at the bar to answer such complaint: therefore it is not necessary, for the purpose of correcting the misrepresentation, that a member should be the publisher of his own speech. It has been argued that the proceedings of Courts of Justice are open to publication. Against that as an unqualified proposition I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would every one be at liberty to poison the minds of the public by circulating that which, for the purposes of justice, the Court is bound to hear? I should think not; and it is not true, therefore, that in all instances the proceedings in a Court of Justice may be published." Mr. Justice Le Blund says, "As to the right of a member of parliament to speak in Parliament what is defamatory to the character of another, that, sitting in a Court of Justice, we were not at liberty to inquire into that, because every member had privilege of speech in Parliament; but when he published his speech to the world, it then became the subject of common law jurisdiction, and the circumstance of its being accurate, or intended to correct a misrepresentation, would not the less make him amenable to the common law in respect of the publication."

Now these remarks in *The King v. Crewey* (a), very materially neutralize the opinions of Lord Kenyon and Mr. Justice Lawrence in *The King v. Wright* (b). But after all, none of the cases of *The King v. Lord Abington* (c), *The King v. Wright* (b), and *The King v. Crewey* (d), were publications under the orders of the House, and do not affect the question of privilege, and therefore I only consider them as declaring the opinion of judges on publications to the public at large of what has occurred in Parliament.

(a) 1 M. & S. 273.

(c) 1 Esp. 226.

(b) 8 T. R. 293.

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I would also take this opportunity of referring to the argument raised as to the publication of trials in Courts of Law, and which it has often been stated are justifiable, though they may contain matter defamatory to the character of individuals. I am by no means prepared to say that, as a general proposition, they may be justified. Besides the opinions of Lord Ellenborough and Mr. Justice Bayley and Mr. Justice Le Blanc, as before expressed, I may refer to the case of *Stiles v. Nokes* (a), and *The King v. Mary Carlisle* (b), *Lewis v. Walter* (c), and *Flint v. Pike* (d), that it must not be understood, that on all occasions the publication of trials which contain matter defamatory of the character of individuals can be justified.

It is said, that it is proper that the members of the House should have the right to send copies of all the Parliamentary papers to their constituents, to justify themselves in case their constituents should find any fault with their conduct in Parliament. If the member whose conduct is blamed by his constituents wishes to vindicate his conduct, he may send what Parliamentary papers he pleases, provided they do not contain any criminary matter of individuals; but I think it can never be considered as justifiable to publish defamatory matter of other persons to justify his own conduct in Parliament.

As to the general information to be given to the public of all that is going on in Parliament, I cannot conceive upon what ground that can be necessary. I do not consider, as a matter of right, that the public should know all that is going on in Parliament. But as to the right of communicating the proceedings in Parliament to the public, if it be meant to communicate any papers, which contain matters defamatory, as they think proper, that is a matter which, in my judgment, can only be done by an act of the legislature. And I do not think that the communicating defamatory pa-

(a) 7 East, 493.

(b) 1 B. & Ald. 167.

(c) 4 B. & Ald. 605.

(d) 4 B. & C. 473; S. C. 6 D. & R. 528.

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pers to the public can be justified as a matter of necessity, or as reasonable to be done. An argument has been introduced in favour of the right to publish the proceedings in Parliament from the act of 48 Geo. 3. chapter 63, allowing the votes and proceedings in Parliament to be sent free of postage. It may be thought very right to allow these

papers to be sent free of postage on general principle; but no argument can be adduced from that that the act meant to sanction the publication of such papers as are defamatory.

Then it is said the plaintiff is defamed by these papers being delivered to the members, and therefore it is of little consequence whether the number of defamatory papers is extended; but thousands of copies may be distributed under the order of the House, and upon no principle of law it can be contended that, because a man may be lawfully criminated amongst one class of her Majesty's subjects, that he may be so amongst all.

Then it is said that though the defaming a man is a bad character, yet it is an evil of small magnitude compared with the advantages that may result from the publication of defamatory papers; but it does not appear that, as a general proposition, benefit is to be expected to result from the publication of defamatory papers. But the advantages are altogether undefined and uncertain, and cannot as a matter of law be set off against the positive injury arising to a man from his character being defamed. But if such a principle of law could be admitted, it would be necessary to show what was the advantage to be derived from such a publication. It is said that there is no instance of any action having ever been brought against any person for publishing parliamentary papers, the publication of which was sanctioned by the resolution of either House of Parliament, and that that is a very strong reason why the action is not maintainable. That is sometimes given as a reason why an action cannot be maintained; but all such cases depend upon their own particular circumstances.

when such cases arise, the principles of law are examined, and if they apply, the Courts decide an action to be maintainable, though no case has ever been brought before, but here the action, taken by itself, is confessedly maintainable, and the question is about the justification. Now the same identical justification was never pleaded before, and I know of, and the question, therefore is, not whether the action itself is maintainable, but whether there can be any objection to it, because the defence has never been set up. If the defence has never been pleaded before, and never brought into discussion on any other occasion, except as far as I have before mentioned, there is no more reason to say that it is good, or that it is bad, till it has been investigated.

But it is said that the practice of publishing parliamentary papers never has been disputed, and that there has been a complete acquiescence in it amongst all classes of persons, and that there have been a great many occasions, where discussions have arisen, in which circumstances relating to individuals have been laid before Parliament, and that copies of these proceedings have been distributed through the country; for instance, in the investigation of the South Sea scheme, the Slave Trade, the Municipal Corporation Act, and many others, and yet nobody has ever come forward to institute any proceedings upon them. Against those who furnished any calumnious matter to be laid before the House, or against any one who published them for the use of the members, no proceeding can be instituted. But as to those who distributed them to the public, it may be remarked, that persons, whose conduct and character might be impugned where abuses existed, might feel that they deserved the imputation, and that the charges against them were true, and therefore their taking any proceedings would only be to make the matter worse, and as to those who were unconscious of deserving the charges, they might think that it would not be advisable to enter into a contest with the House of Commons.

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It is said to allow this to be decided is contrary to the Bill of Rights. The Bill of Rights, 1 *William & Mary*, sess. 2, chap. 2, declares, that the freedom of speech and debates on proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament. This does not, in my opinion, in the smallest degree infringe upon the Bill of Rights. I think this is not such a proceeding in Parliament as the Bill of Rights refers to; it is something out of Parliament. The privileges of Parliament appear to me to be confined to the walls of Parliament, for what is necessary for the transaction of the business there, to protect individual members, so as that they may always be able to attend their duties, and to punish persons who are guilty of contempts to the House, or against the orders and proceedings or other matters relating to the House, or to individual members in discharge of their duties to the House, and to such other matters and things as are necessary to carry on their parliamentary functions, and to print documents for the use of the members. But a publication sent out to the world, though founded on and in pursuance of an order of the House, in my opinion becomes separated from the House; it is no longer any matter of the House, but of the agents they employ to distribute the papers; those agents are not the House, but in my opinion they are individuals acting on their own responsibility, as other publishers of papers.

I admit that, if my opinion be correct, the same question may be agitated in the inferior Courts, such as the Quarter Sessions Courts and County and Borough Courts; that however results from the law: if the law be so, they have the right to inquire into it. I therefore, upon the whole of this case, again point out what Lord *Ellenborough* very much relied upon in his judgment in *Burdett v. Abbot* (a), when he said, that "it is made out that the power of the House of Commons to commit for contempt stands upon

(a) 14 East, 158.

the ground of reason and necessity, independent of any positive authorities on the subject; but it is also made out by the evidence of usage and practice, by legislative sanction and recognition by the Courts of Law, in a long course of well-established precedents and authorities." But in the case now before the Court, I think that the power of the House of Commons to order the publication of papers containing defamatory matter does not stand upon the ground of reason and necessity, independent of any positive authorities on the subject. And I also think that it is not made out by the evidence of usage and practice, by legislative sanction and recognition in the Courts of Law, in a long course of well-established precedents and authorities. Upon the whole of the case, I think there should be judgment for the plaintiff.

PATTERSON J.—This is an action for a libel contained in a copy of certain inspectors of prisons, appointed under the act 5 & 6 William 4, c. 38, to a Report of the Court of Aldermen in London, and published by the defendants. The plea states that an original report of the inspectors was laid before the House of Commons under the provisions of that act; that their reply to the Court of Aldermen was laid before the House, pursuant to an order of the House, and became part of the proceedings of the House, which, as a matter of fact, is admitted by the demurrer. The plea also sets out a resolution of the House of Commons of the 13th August, 1835, that the parliamentary papers and reports, printed for the use of the House, should be rendered accessible to the public by purchase at the lowest price at which they could be furnished, and that a sufficient number of extra copies should be printed for that purpose. It also sets out the appointment of a committee on the subject, their resolution, and a further resolution and order of the House, that the parliamentary papers and reports, printed by order of the House, should be sold

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to the public at certain specified rates; and that Messrs. Hansard, (the defendants,) the printers of the House, be appointed to conduct the sale thereof. It also states orders of the House for printing the original report of the inspectors, and their reply. The plea then alleges that the defendants printed and published the report and reply by authority of the House; and, in conclusion, it sets out a resolution of the House of the 31st May, 1837, by which it was resolved, declared and adjudged, that the power of publishing (not of its reports, votes and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of the Commons' House of Parliament, as the representative portion of it. The declaration in this case is entitled on the 30th May, 1839, the day before the last-mentioned resolution. // This resolution must be treated as declaratory only of a supposed ancient power of the House of Commons to publish; and that for two reasons; first, because if it be treated as creating a new power or privilege, it would plainly be an alteration of the existing law, and an enactment of a new law by one branch of the legislature only, which it is admitted on all hands cannot lawfully be done; neither is the language of the resolution consistent with such a supposition; for, if the power or privilege be essential now, it must always have been so, since the constitutional functions of Parliament have always been the same; secondly, if it be treated as a new power or privilege, it is not applicable to the libel for the publication of which this action is brought, nor to the action itself, both of which are prior to the passing of the resolution. // The resolution in its terms seems to imply the exercise of some discretion in the House, in selecting portions of its proceedings for publication; for it is limited to such of its proceedings as it shall deem necessary or conducive to the public interests. One would therefore have expected to see some averment in the plea, that the publication in

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question had been decided by the House of Commons, yet nothing of the kind is to be found. However, as the present is a private resolution of the House, that the Parliamentary Papers and Reports printed by order of the House should be sold to the public, I suppose it must be taken upon this record that the House of Commons deemed it necessary or conducive to the public interests to publish all the Parliamentary Papers and Reports of which it ordered to be printed, without exercising any other discrimination into particular Reports than may be supposed to have been exercised when they were ordered to be printed, and the same may be taken as an averment in the plea that the publication in question was by authority of the House, which is admitted by the defendant to nothing more or less than as the two questions appear to arise on this record. It is also to be noted, whether a motion shall be made or not, for and at whatever admitted to have been done by the order and authority of the House of Commons. It is also to be noted. Secondly, whether a resolution of the House of Commons, declaring that it had power to do the act complained of precluded this Court from inquiring into the legality of that act. And the no doubt is a duty which is imposed. Thirdly, if such resolution does not preclude this Court from inquiring, then whether the act complained of be legal or not. As to the first question, it has not been contended in argument that either House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law. Extravagant cases have been sometimes put, illustrating the impossibility of maintaining such a proposition. It has been answered truly, that it is not decent or respectful to these high assemblies to suppose that such extravagant cases should arise, but less extravagant cases have arisen—cases in which both Houses of Parliament have confessedly exceeded their powers in punishing persons for trespasses on the lands of members, and other matters, wholly without their jurisdiction, but

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which they have treated as questions of privilege; and, though no instance has been cited of any action having been brought, but, on the contrary, the persons proceeded against have very commonly submitted to the illegal treatment they have met with, yet surely the maxim of law must apply, namely, that there is no wrong without a remedy; and where can the remedy be but by action in a Court of Law against those who have done the injury? If it be once conceded that either House of Parliament can make an illegal order, it must necessarily follow that the party wronged may have redress against those who carry such illegal order into effect; and how can he have such redress but by action at law? Great difficulties may undoubtedly arise in distinguishing between acts done *in* the House, and *out* of the House under orders given *in* the House, and in determining against whom such action would lie. It is clear that *no action can be maintained* for any thing said or done by a member of either House in the House, and the individual members composing the House of Commons, whether it be a Court of Record or not, may, like other members of a Court of Record, be free from personal liability on account of the orders issued by them as such members. Yet if the orders themselves be illegal, and not merely erroneous, upon no principles known to the laws of this country can those who carry them into effect justify under them. A servant cannot shelter himself under the illegal orders of his master, nor could an officer under the illegal orders of a magistrate, until the legislature interposed and enabled him to do so. The mere circumstance, therefore, that the act complained of was done under the order and authority of the House of Commons, cannot of itself excuse that act, if it be in its nature illegal; and it is necessary, in answer to an action for the commission of such illegal act, to show not only the authority under which it was done, but the power and right of the House of Commons to give such authority. This point, indeed, was not pressed upon the argument of this case, but I have men-

tioned it because it seems to me that it will be very difficult to maintain the affirmative of the second question, if this first point be given up.

The second question is, as I conceive, raised upon this record by the declaratory resolution of the 31st May, 1837, set out at the conclusion of the plea. The other resolutions and orders set out in the plea are not declaratory of the power or privilege of the House, but directory only; and, as it has been shewn that it is possible that the House, however unintentionally, may make illegal orders, and that, if it should do so, those who carry them into effect may be proceeded against by action at law, it follows that the Court in which such action is brought must, upon demurrer, inquire into the legality of those directory orders, and must not be precluded from doing so by the mere fact of those orders having been made. If this Court, then, be not precluded from entertaining the question as to the legality of the directory orders, by the orders themselves, it is precluded, if at all, by the resolution of the 31st May, 1837, and by nothing else. No other resolution of the House of Commons to a similar effect is set out in the plea, and we cannot look out of the record. It is certainly somewhat strange to urge that this Court, in which the present action was already pending, and which had already on its proceedings the declaration of the plaintiff, should be precluded from entering into the question by a resolution of the House of Commons passed between the declaration and the plea. But I pass on to consider the effect of the resolution as if it had been passed long before any action had been brought in which a question could arise as to the existence of the power to which it relates. The proposition is certainly very startling, that any man, or body of men, however exalted, except the three branches of the legislature concurring, should, by passing a resolution that they have the power to do an act illegal in itself, be able to bind all persons whatsoever, and preclude them from inquiring into the existence of that power and the legality of that act. Yet this resolution goes

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to that extent, for unless it is taken to mean that the House of Commons has power to order the publication of that which it knows to be defamatory of the character of an individual, and to protect those who carry that order into effect from all consequences, it will not avail the defendants in this action. I take the resolution therefore to have that meaning, though the language of it does not necessarily so import; and I take it also, in combination with the resolutions in 1835 to mean, that the House of Commons deems it necessary or conducive to the public interest that *all* the Parliamentary Papers which it orders to be printed should be sold; though the resolution of 1837, by itself, would seem to imply directly the contrary, and that some discrimination as to publishing should be exercised on the subject. Now, if the House of Commons, by declaring that it has power to publish all the defamatory matter which it may have ordered to be printed in the course of its proceedings with impunity to its publisher, can prevent all inquiry into the existence of that power, I see not why it may not, by declaring itself to have any other power in any other matter, equally preclude all inquiry in Courts of Law or elsewhere as to the existence of such power; and what is this but absolute arbitrary dominion over all persons, liable to no question or control? It is useless to say that the House cannot by any declaratory resolution give itself *new* powers and privileges; it certainly can, if it can preclude all persons from inquiring whether the powers and privileges, which it declares it possesses, exist or not; for then how is it to be ascertained whether those powers and privileges be new or not? If the doctrine be true, that the House, or rather the members constituting the House, are the sole judges of the existence and extent of their powers and privileges, I cannot see what check or impediment exists to their assuming any new powers and privileges which they may think fit to declare; I am far from supposing that they will knowingly do so; but I see nothing to prevent it. Some mode of ascertaining whether the powers and privileges so de-

clared, be now or not must surely be found, and it will be conceded that the Courts of Law, when that question of necessity arises before them, may make the inquiry, with the doctrine, that the resolution of the 31st of May, 1837, precludes inquiry by this Court, must fall to the ground. But, it is argued, that the point must be ascertained by reference to public opinion. I cannot find in the common law or statute law, or in any books of authority whatever, any allusion to such reference; and indeed, what tribunal can be conceived more uncertain, fluctuating, and unsatisfactory than public opinion? It is even difficult to define what is meant by the words "public opinion." It is further argued, that the Courts of Law are inferior Courts to the Court of Parliament and to the Court of the House of Commons, and cannot form any judgment as to the acts and resolutions of their superiors. I admit, fully, that the Court of Parliament is superior to the Courts of Law, and in that sense they are inferior Courts; but the House of Commons by itself is not the Court of Parliament. Further, I admit that the House of Commons being one branch of the legislature to which legislature belongs, the making of laws is superior in dignity to the Courts of Law, to whom it belongs to carry those laws into effect, and in so doing of necessity to interpret and ascertain the meaning of those laws. It is superior also in this, that it is the grand inquest of the nation, and may inquire into all alleged abuses and misconduct, in any quarter of course in the Courts of Law or any of the members of them; but it cannot by itself correct or punish any such abuses or misconduct; it can but accuse or institute proceedings against the supposed delinquents, in some Court of Law, or can jointly with the other branches of the legislature, remedy the mischief by a new law. With respect to the interpretation and declaration of what is the existing law, the House of Lords is doubtless a superior Court to the Courts of Law, and those Courts are bound by a decision of the

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House of Lords, expressed judicially upon a writ of error or appeal, in a regular action at law or suit in equity; but I deny that a mere resolution of the House of Lords, or even a decision of that House in a suit originally brought there, (if any such thing should occur, which it never will, though formerly attempted), would be binding upon the Courts of Law, even if it were accompanied by a resolution that they had power to entertain original suits, much less can a resolution of the House of Commons, which is not a Court of Judicature for the decision of any question, either of law or fact, between litigant parties, except in regard to the election of its Members, be binding upon the Courts of Law; and it should be observed, that in making this resolution, the House of Commons was not acting as a Court either legislative, judicial or inquisitorial, or of any other description. It seems to me, therefore, that the superiority of the House of Commons has really nothing to do with the question.

But it is further said, that the Courts of Law have no knowledge or means of knowledge as to the *lex et consuetudo Parliamenti*, and cannot therefore determine any question respecting it. And yet at the same time it is said that the *lex et consuetudo Parliamenti* are part of the law of the land, and this Court is in this very case actually called upon by the defendants to pronounce judgment in their favour, upon the very ground that their act is justified by that very *lex et consuetudo Parliamenti*, of which the Court is said to be invincibly ignorant, and to be bound to take the law from a resolution of one branch of the Parliament alone. In other words, we are told that the judgment we are to pronounce is not to be the result of our own deliberate opinion on the matter before us, but that which is dictated to us by a resolution of the House of Commons, into the grounds and validity of which resolution we have no means of inquiring, and are indeed forbidden by parliamentary law to inquire at all. I cannot agree to that position; if I am to pronounce a judgment at all in this or in any other case,

it must and shall be the judgment of *my own mind*, applying the law of the land, as I understand it, according to the best of my abilities, and with regard to the oath which I have taken, to administer justice truly and impartially. But after all, there is nothing so mysterious in the law and custom of Parliament, so far at least as the rest of the community not within its walls is concerned, that this Court may not acquire a knowledge of it in the same manner as of any other branch of the law. In the margin of the well-known passage in Lord Coke's Fourth Institute (*e*), it is said to be *lex ab omnibus quærenda, a multis ignorata, a paucis cognita*. The same might with the same truth be said of any other part of the law. Lord Coke says in the same place, that the High Court of Parliament *suis propriis legibus et consuetudinibus subsistit*. This is perfectly correct also, when applied to the internal regulations and proceedings of Parliament, or of either House; but it does not follow that it is so when applied to any power it may claim to exercise over the rest of the community. It is, indeed, quite true that the members of each House of Parliament are the sole judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority, and so they must necessarily adjudicate on the extent of their privileges. All the cases respecting commitments by the House, mostly raised upon writs of habeas corpus, and collected in the arguments and judgments in *Burdett v. Abbot* (*b*), establish at the most only these points, that the House of Commons has power to commit for contempt, and that when it has so committed any person, the Court cannot question the propriety of such commitment, or inquire whether the person committed had been guilty of a contempt of the House, in the same manner as this Court cannot entertain any such questions if the commitment be by any other Court having power to com-

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(a) 4 Inst. 15, in marg.

(b) 14 East, 1.

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mit for contempt. In such instances there is an adjudication of a Court of competent authority, in the particular case, and the Court which is desired to interfere, not being a Court of Error or of Appeal, cannot entertain the question whether the authority has been properly exercised. In order to make cases of commitment bear upon the present, some such case should be shown, in which the power of the House of Commons to commit for contempt under any circumstances was denied, and in which this Court had refused to enter into the question of the existence of that power; but no such case can be found, because it has always been held that the House had such power; and the point attempted to be raised in the cases of commitment has been as to the due exercise of such power. The other cases which have been cited in argument relate generally to the privileges of individual members, not to the power of the House itself, acting as a body; and hence, as I conceive, has arisen the distinction between a question of privilege coming directly or incidentally before a Court of Law. It may be difficult to apply the distinction; yet it is obvious that upon an application for a writ of habeas corpus by a person committed by the House, the question of the power of the House to commit, or of the due exercise of that power, is the original and primary matter propounded to the Court, and arises directly. Now, as soon as it appears that the House has committed the person for a cause within their jurisdiction, as, for instance, for a contempt, so adjudged to be by them, the matter has passed *in rem judicatum* and the Court before which the party is brought by writ of habeas corpus must remand him. But if an action be brought in this Court for a matter over which the Court has general jurisdiction, as, for instance, for a libel, or for an assault and imprisonment, and the *plea first* declares that the authority of the House of Commons, or its powers, are in any way connected with the case, the question may be said to arise incidentally; the Court must give some judgment, must somehow dispose of the question. I do not,

however, lay any great stress on this distinction. It seems to me, that if the question arises in the progress of a cause, the Court must of necessity adjudicate upon it, whether it can be said in strict propriety of language to arise directly or incidentally.

I do not purpose to go through all the authorities upon this part of the subject, which have been already examined by my Lord, but to confine myself to a few of the leading cases. Before, however, I do so, I would observe, that privilege and power appear to me to be very different things, as I shall have occasion to observe hereafter, and that the present question appears to me to relate to the powers of the House of Commons, and not to its privileges, properly so called.

The principal case is *Thorp's case*, 31 Henry 6. I cannot pretend, after all the observations which have been made upon that case by counsel and judges, and by the Report of the Committee of the House of Commons, on which the resolution of 31st May, 1837, was founded, and to which we have been referred by the Attorney-General, to throw any new light upon the real grounds of the answer there first delivered by the judges. With all deference for ancient authority, it appears to me to have been an evasive answer, probably arising from the circumstances of the times; but if that be not so, the answer being given in the House of Lords has respect to the situation both of those who proposed the question, and those who gave the answer, and amounts only to this, — that they, the judges, ought not to be called upon by the lords in Parliament to inform them as to the privileges of Parliament, which they must themselves know; but it is nothing like a disclaimer of being able to decide any such question, if it should arise in their own Courts; and as to that part of their answer in which they speak of Parliament being able to make that law which was not law, it is plainly beside the question proposed, for it must relate to the power of the three branches of the legislature concurring, and not to any reso-

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lutions of any one of them separately, or even of any two of them; added to which, they do actually give their opinion as to what they would hold in their own Courts, and the Lords adopt and act upon it. The passages in Lord Coke's Fourth Institute rest upon *Thorp's* case, and if the foundation fails, the superstructure cannot stand, however celebrated the architect may be. Expressions are certainly to be found in *Rex v. Wright (a)*, which appear to withdraw from the Courts of Law all power of noticing the publication of parliamentary papers; but the expressions used by Lord Kenyon appear to me (I say it with hesitation, *pactanti viri*) to be quite inconsistent; and I am at a loss to know on what ground he really proceeded; whilst Mr. Justice Lawrence appears to have considered that the matter was not libellous, let it be published by whom it would; and it is to be observed, that it did not appear that it was published by order of the House of Commons. Again, the authority of that case is greatly shaken by *Rex v. Creevey (b)*; and even if that was not so, it is to be recollected that the motion there was for a criminal information, which is a matter of discretion and not of right; and moreover that the doctrine as to the legality of publishing proceedings of courts of justice was then recently held, without those qualifications and restrictions which, as I think, common sense and the obvious good of the community at large have compelled the judges since that time to engraft upon it.

On the other hand, the cases of *Donne v. Walsh (c)*, *Ryver v. Cosin (d)*, and *Benyon v. Evelyn (e)*, show that the Courts of Law have taken cognizance of such questions, and have decided contrary to the known claims of the House for its members; and whether it be true or not that Sir Orlando Bridgman made a gratuitous and unnecessary display in the latter case, this is certain, that his learned and laboured judgment must have excited, and did excite, great attention;

(a) 8 T. R. 293.

(b) 1 M. & S. 273.

(c) 1 Hats. 41.

(d) 1 Hats. 42.

(e) O. Bridgman, 324.

and yet the decision was acquiesced in. It is true that we have no evidence of the direct interference of the House in that case, neither could they constitutionally interfere as a body, inasmuch as no act of theirs, as a body, was brought into question; but no one doubts that the claim of the member was in reality the claim of the House. To that case may be added *Fitzharris's case* (a), and that of the *Duchess of Somerset v. Earl of Manchester* (b), and the memorable cases of *Ashby v. White* (c), *Reg. v. Paty* (d), and *Knollys's case* (e). I do not mention these last cases as showing that the jurisdiction of the Courts of Law, in matters said to concern the privileges of Parliament, has been conceded by the House of Commons, but as showing that it has not been decided that such jurisdiction in no case exists; and in *Ashby v. White* (c) there was strong ground for maintaining that the House of Commons had exclusive jurisdiction over the subject as a Court of Judicature, though I think not sufficient grounds: whereas on the present question there is no possible ground for so saying. I agree that the case of *Rex v. Williams* (f) is not to be relied on. The political character of it, the violence of the times, and the just dread of arbitrary power in the Crown, which occasioned the allusion to it in the Bill of Rights, deprive it of authority as a solemn judgment of the Court. Yet it is plain that the Speaker of the House of Commons could not be justified, even under the law of privilege as declared by the resolution of the 31st May, 1837, in publishing *Dangerfield's Narrative*, which was no part of the proceedings of the House; and the bare authority of the House could alone be set up as his justification, which I have already shown to be insufficient for that purpose. Another ground may be taken to show that *Rex v. Williams* (g) was not a right decision; that the thing done by him, viz. the order to publish, may be said to have been done in

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(a) 8 How. St. Tr. 223.

(b) Pryn. Reg. Pt. 4, 1214.

(c) 2 Ld. Raym. 938.

(d) 2 Ld. Raym. 1105.

(e) 12 How. St. Tr. 1167.

(f) 13 How. St. Tr. 1369:

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the House, and so not to be cognizable by the Courts of Law. Yet the man himself, for whose benefit the publication took place, *Dangerfield*, was committed and punished for publishing the very same thing out of the House. That which was reprobated in *Williams's* case was the prosecution by the officer of the Crown of the Speaker of the House for an act done by him as such Speaker. The legality of such an act, as regarded private individuals, was in no way brought under review. And the Bill of Rights plainly points at prosecutions for proceedings in Parliament only. I do not particularly advert to the other cases cited from *Hatsell* and other books, for they really do not appear to me to bear materially upon this part of the case, or indeed upon any of the questions raised upon this record. The supposed mischief of an appeal to the House of Lords cannot surely prevent this Court from adjudicating on the question. Indeed, the Attorney-General asks us to pronounce judgment for the defendants, because the House of Commons have resolved that we are bound to do so; yet upon that judgment a writ of error will lie just as much as if we give judgment for the plaintiff. To avoid such inconvenience, if it be important to do so, some legal mode should have been found of making it unnecessary for us to give any judgment at all, but no such mode can be found. The analogy attempted to be established upon the argument from decisions of Courts of exclusive jurisdiction appears to me not to hold good. The instances adduced are in respect of matters admitted to be within the exclusive jurisdiction of such Courts, whether Ecclesiastical or Courts of Admiralty, or Foreign Courts, and in which they have in the particular case come to a decision, and so the matter has passed *in rem judicatam*; but none have been or can be cited, where a decision of any of those Courts, that a particular matter is within its exclusive jurisdiction, has been allowed to be binding upon other Courts as to that position, and to oust them of their right of jurisdiction it may be that in some cases there is concurrent juris—

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diction, and, as I have before observed, the resolution of May, 1837, cannot be considered to have been passed by the House of Commons *as a Court* either legislative, judicial or inquisitorial, or of any other description. Cases were cited by the Attorney-General where the Court of Exchequer had taken from the other Courts of Law proceedings pending before them; but they were cases of revenue belonging by the king's prerogative peculiarly to that Court, and in which that Court had confessedly exclusive jurisdiction.

Some cases were also cited where the House of Lords had compelled parties to relinquish proceedings in the Courts of Law in respect of matters occurring in that House, as to which it is conceded that the Courts of Law cannot have cognizance.

It is further argued that, if this Court can entertain this question, so can the most inferior court of record in the Kingdom, where the matter arises within its jurisdiction; I admit it to be so, but I can see no reason why the mere resolution of the House should preclude an inferior Court from the inquiry any more than this Court, nor can I see any thing derogatory to the dignity of the House in such inquiry. Upon the whole, the true doctrine appears to me to be this: that every Court in which an action is brought upon a subject-matter generally and *prima facie* within its jurisdiction, and in which by the course of the proceedings in that action the powers and privileges and jurisdiction of another Court come into question, must of necessity determine as to the extent of those powers, privileges and jurisdiction; that the decisions of that Court, whose powers, privileges and jurisdiction are so brought into question as to their extent, are authorities, and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this Court is not precluded by the resolution of the House of Commons of May 1837 from inquiring into the legality of the act complained of, although we are

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bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution, unless we find ourselves compelled to do so by the law of the land, gathered from the principles of the Common Law, so far as they are applicable to the case, and from the authority of decided cases, and the judgments of our predecessors, if any be found, which bear upon the question.

I come, then, to the third question: whether the act complained of be legal or not. I do not conceal from myself that, in considering this point, the resolution of the House of Commons of 31st May 1837 is directly called in question; but, for the reasons I have already given, I am of opinion that this Court is not only competent, but bound, to consider the validity of that resolution, paying all possible respect and giving all due weight to the authority from which it emanates.

The privilege, or rather power (for that is the word used), which that resolution declares to be an essential incident to the constitutional functions of Parliament, is attempted to be supported—first, by showing that it has been long exercised and acquiesced in; secondly, that it is absolutely necessary to the legislative and inquisitorial functions of the House.

1st. As to exercise and acquiescence: I am far from saying that, in order to support any privilege or practice of Parliament, or of either House, it is necessary to show that such privilege or practice has existed from time of legal memory. That point was disposed of by Lord *Ellenborough* in the course of the argument in *Burdett v. Abbot* (a). Long usage, commencing since the two Houses sat separately (if, indeed, they ever sat together, as to which I do not stop to inquire, nor *when* they separated, as being wholly immaterial to this question), may be abundantly sufficient to establish the legality of such privilege or practice.

(a) 14 East, 1.

Now, with respect to the exercise of the power in question, I conceive that such exercise is matter of history, and therefore that the observation of Mr. Attorney-General, that he ought not to be called upon, in arguing a demurrer, to prove matter of *fact*, is not well-founded. *If* indeed the plea had stated that the Commons' House of Parliament had been used to exercise this power, the demurrer would have admitted the exercise; but no such averment appears upon the face of the plea; and the historical fact of the exercise of the power is introduced by the defendants' counsel himself, in order to argue thence that the power must be legal. The onus of shewing that it is so lies upon the defendants, for it is certainly *prima facie* contrary to the Common Law. It is very remarkable that no mention is made of this alleged power of the House of Commons in any book of authority, or by any text writer. It is nowhere enumerated among the privileges or powers of the House. After the utmost research by the learned counsel who so ably argued this case, he has not furnished us with a single passage from any author, nor have I found any, in which even a hint is thrown out that the House of Commons has power to order defamatory matter, appearing upon its proceedings, to be published, and to protect the publisher from the consequences which generally attach to the publication of such matter. Surely, if such a power had really existed, some notice of it would have been taken by *Hatsell* or *Blackstone*, or some other writer, in commenting upon parliamentary privilege, and the absence of all such notice is to me a strong circumstance to shew that it really never existed. The first instance of the House *printing* any thing appears to have been in the year 1641. It is, indeed, argued by Mr. Attorney-General that, although the votes and proceedings of the House do not appear to have been *printed* and published before that time, yet that, doubtless, some other mode of publication, either at the Sheriffs' Courts, or some other occasions of public meeting,

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must have been adopted. As to which argument I must say that it appears to me to be a purely gratuitous assertion, without the semblance of probability. Acts of Parliament, that is, new laws, appear to have been so promulgated; but there is not a trace to be found, that I am aware of, of the votes and proceedings of either House separately having been so dealt with. The exercise of this power cannot therefore be said to have commenced earlier than 1641, a most suspicious time in the history of this country for the acquisition of a new power by the House of Commons. From 1641 to 1680 it appears that specific votes and proceedings only were printed from time to time by special resolutions. The papers first printed appear to relate entirely to the contest between the King and the House, and were, no doubt, intended for general circulation; but surely it is impossible to contend that a practice, arising out of the unfortunate and violent state of the times, can be supported, unless other reasons, applicable to quiet and ordinary times, can be assigned for its continuance. In 1680 the first general order for printing the votes and proceedings of the House is made, and, with the exception of a short time during the year 1702, has been continued to the present time. The votes and proceedings so printed appear also to have been sold during that time, whether as a perquisite of the officers or not is perhaps not very material, and no question has arisen respecting the legality of the practice. The votes and proceedings so printed, appear to have been recognized by the House of Lords as authentic documents, upon which, however, I do not see that much stress can be laid, inasmuch as the fact of their being printed under the order of the House of Commons must of necessity authenticate them, whether it were legal so to print them or not. These votes and proceedings are quite distinct from Reports and Miscellaneous Papers printed for the House, and do not seem to have contained at any time matters defamatory to private individuals, and therefore the absence of any attempt to question their le-

gality can hardly be treated as any acquiescence; no one was aggrieved.

With respect to Reports and Miscellaneous Papers printed for the use of the House, it appears that no general order for their publication and sale was made until the resolution of 1835, set out in the plea in this action. Many resolutions were passed from time to time as to printing and publishing specific papers, and many of those papers were of such a nature that private individuals may have felt themselves aggrieved, and may have found in them matters defamatory to themselves, for which actions at law might plainly have been maintained, if published under ordinary circumstances, unconnected with the House; and it is, as I apprehend, upon the absence of any trace of such actions with respect to such papers, that the argument with regard to acquiescence mainly rests. The argument is undoubtedly entitled to consideration; it has been frequently used in other cases; and much weight has been given to it by great authorities, particularly by Mr. Justice *Buller*, in the case of *Le Caux v. Eden* (a); but it is obvious that the weight of it much depends upon the nature of the injury sustained, the relative power of the person inflicting it, and the person sustaining it, and the greater or less difficulties with which the remedy is surrounded. If these points be attended to, it is hardly possible to imagine a case less likely to be brought forward than that of a man who found that he was defamed in a paper published by the order of the House of Commons, as part of their proceedings; not to mention that, in very many instances, especially if due discrimination was exercised, as I cannot help thinking was formerly the case, the defamatory matter was strictly true, and therefore an action would be useless, and criminal proceedings equally so, as regarded any remuneration to the party complaining. The fear of contending with so powerful a body must operate very strongly in deterring persons from bringing actions, and may well account for the attempt

(a) 2 Dougl. 594.

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never having been made. In the case of *Lake v. King* (a), indeed, the attempt was made to render a petitioner to the House of Commons liable in damages to a person who was defamed in his petition, which he had printed for circulation amongst the members of the House. The action was held not to lie, the distribution of the publications having been confined to the members of the House. The exercise of the power by the House until 1835 appears to have been by special order, directing sometimes that papers be printed for the use of the House; sometimes that they be printed (generally); sometimes that they be also published; and they appear to have been sold by officers of the House as a perquisite, until, in 1835, the resolution set out in the plea was come to, that they should be sold by the defendants to the public in general; the object being, so far as it can be collected from the resolution, to defray the expenses of printing that which was requisite for the use of the members, not to give any important or necessary information to the constituents of the different members of the House.

It is said that the House of Lords has constantly ordered the printing and publishing of papers and proceedings, and that no instance occurs of any action having been brought against the publisher. The same observations apply to such practice in that House as have already been urged with respect to the House of Commons, except as relating to *trials* in the House of Lords. They are proceedings in an open Court of Justice, and may properly be considered under the second ground on which this power is supposed to exist, namely, the necessity for it.

Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that *whatever is done or said in either House should not be liable to examination elsewhere*. Therefore no order of either House can itself be treated as a libel, as the Attorney-General supposed it might if his action would

(a) 1 Sand. 131.

lie. No such consequence will follow. The power claimed is said to be necessary to the due performance both of the legislative and inquisitorial functions of the House. In all the cases and authorities, from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its members, in relation to the rest of the community, have been either some privilege, properly so called, i. e. an exemption from some duty, burden, attendance or liability to which others are subject; or the power of sending for and examining all persons and things, and the punishing all contempts committed against their authority. Both of these powers proceed on the same ground, viz. the necessity that the House of Commons and the members thereof should in no way be obstructed in the performance of their high and important duties; and that if the House be so obstructed, either collectively or in the persons of the individual members, the remedy should be in its own hands and immediate, without the delay of resorting to the ordinary tribunals of the country. Hence liberty of speech within the walls of the House, freedom from arrest, and from some other restraints and duties during the sitting of Parliament, and for a reasonable time before and after its sitting, (with the exception of treason, felony and breach of the peace,) which, although the privileges properly so styled of the individual members, are yet the privileges of the House. Hence the power of committing for contempt those who obstruct their proceedings, either directly by attacks upon the body or any of its members, or indirectly by vilifying or otherwise opposing its lawful authority. Cases have frequently arisen in which the extent and exercise of these privileges and powers have come in question, and I believe that all such cases will be found to range themselves under one of the two heads I have mentioned. But this is, I believe, the first time in which a question has arisen as to the power of the House to authorize an act prejudicial to an individual who has neither directly nor indirectly obstructed the proceedings of the House, and is

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in no way amenable to its authority. The decision of *Lake v. King* (a), which I mentioned before, proceeded on similar grounds of necessity. Every facility ought undoubtedly to be given to all persons applying to either House of Parliament, or to any Court of Justice, for the redress of any alleged grievance, and it would be most inconvenient to hold such persons liable to actions for any thing contained in such applications as libel; but when those who are applied to circulate generally by sale such defamatory matters, the case assumes a very different character. In the case of *Fairman v. Ives* (b), a petition, addressed by the creditor of an officer in the army to Lord *Palmerston*, the Secretary at War, was held not to be actionable, although containing defamatory matter. But can it be doubted that, if Lord *Palmerston* had ordered it to be published, the publisher would have been liable to an action, or can it be contended that the Secretary of State, to whom the report and reply on which this action is brought were by act of parliament directed to be sent, to be by him laid before the Parliament, would have been justified in publishing them? And, if not, why should the House of Commons be at liberty to do so? In the same manner the protection of all confidential communications extends no further than the necessity of each particular case requires. It is said that if papers, however defamatory, must needs be printed for the use of the members, as it is plain they must, and the point is not disputed, their further circulation cannot be avoided; for what is to be done with the copies upon a dissolution of Parliament, or upon the death or retirement of a member? The answer is obvious; the copy of such defamatory matter ought to be destroyed, as it can no longer be used for the purpose for which it was intended; at all events it must not be communicated to others. But it is said that the constituents have a right to watch over the conduct of their representatives, and therefore to know what passes in the House.

(a) 1 Saund. 131.

(b) 5 B. & Ald. 642.

The House itself is of a different opinion; for it is only by sufferance that any one is allowed to be present at its debates; it is only by sufferance that the debates are allowed to be published; and it is only by the special permission of the House that its votes and proceedings and papers are communicated to the public, and that in the manner in which they think fit to order. If the constituents had a right to know all that passes, or if the House of Commons were an open Court, then, indeed, there might be some colour for saying that it was necessary to publish all its proceedings. It is upon the ground that Courts of Justice are open to the public, that what passes there is public at the time, and that it is important that all persons should be able to scrutinize what is there done, that the publication of every thing which there passes has been thought to be lawful. I for one do not go that length, but think, with some judges of great name who have gone before me, that the doctrine is to be taken with much limitation: but I feel sure that it cannot apply to a Court which is not open, whose proceedings, in contemplation of law, are secret at the time they take place, and to whom *ex parte* statements, often grossly defamatory, are made, without the defamed persons having any opportunity of being heard, and, indeed, often without the possibility of any inquiry being instituted; and it is not impossible, if such indiscriminate publication and sale be continued by the House of Commons, that petitions, containing the grossest libels against the most innocent individuals, may be purposely and maliciously presented to that Honourable House by persons who seek to publish and sell them with impunity, and to make the House most unconsciously the instrument of circulating their slander. It is the nature of the proceedings themselves which justifies, if at all, the publication of what passes in a Court of Justice, and *any person* may therefore publish them; but the proceedings of the House of Commons cannot be published without the authority of the House. The right to publish does not result from the nature of the thing pub-

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lished, but from the leave obtained from the House; and this alone shews that it cannot be matter of necessity for the information of the constituents. I do not say that it may not be conducive to the public interests to inform the world at large of much that passes in the House, but I do say that it cannot be conducive to the public interests to circulate private slander; and that, in the exercise of a due discrimination as to what part of its proceedings shall be published, the House of Commons is bound to take care that such private slander be not circulated by its authority.

But it is said to be necessary, in order to obtain the requisite information for the members in any legislative or inquisitorial measure. This ground is still less tenable: the House is armed with ample powers to send for all persons, who can give them information, either before a committee or at the bar of the House. It can never be necessary to sell indiscriminately to every body, in order to take the chance of some person volunteering information to the House. Will it be said that any one ever did volunteer information in consequence of such publications by the House, or that the House ever waited and paused in its deliberations or its votes, in order to see whether any one would so volunteer? It is not pretended that such has been the fact. Whether any individual member might or might not be justified in communicating to some persons out of the House defamatory matter printed for the use of the House I cannot pretend to say. Probably, upon any such question arising, the decision will lie with a jury; but I would by no means bind myself to any opinion on that subject. This is the case of an open sale to all who choose to buy, not justified by any peculiar circumstances attending this case above others.

Where then is the necessity for this power? Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive,

the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But *power*, and especially the power of invading the rights of others, is a very different thing; it is to be regarded, not with tenderness, but with jealousy, and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. The onus of shewing the existence and legality of the power now claimed lies upon the defendants: it appears to me, after a full and anxious consideration of the reasons and authorities adduced by the Attorney-General in his learned argument, and after much reflection upon the subject, that they have entirely failed to do so; and I am therefore of opinion that the plaintiff is entitled to our judgment in his favour.

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COLERIDGE J.—I concur with the rest of the Court in thinking that this plea discloses no sufficient answer to the declaration; and if my brother *Patteson*, after the full and satisfactory discussion which the question had *then* received, felt reluctant to state his reasons at length, it may well be seen how much more ground there is *now* for me to desire that I might be allowed simply to express my concurrence: but the unusual importance of the principles involved in the decision, and the profound respect due to those whose privileges are said to be at stake in the cause, seem to require that I also should state the reasoning by which I have arrived at this conclusion; and I have the consolation at least to feel certain, that I *cannot* weaken the just effect upon this audience of what has already been stated. I shall not, however, think it necessary to notice all the points which have been made, or to comment on more than a few of the authorities cited in the argument. It would indeed be impossible to do this within any now reasonable bounds; and in my opinion the questions on

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which the cause must turn are so elementary, whatever difficulty there may be in them, that they must after all be decided chiefly upon principle.

Two great questions have been discussed upon the argument, and I shall consider the plea as sufficiently raising them in substance, although I cannot say that they are raised so simply and unambiguously as I should have expected, as well from the great learning, ability and industry employed in framing it, as from the dignity of that high body on behalf of which we are informed that it has been pleaded. The first and immeasurably the more important of these is, whether it be competent to the Court, after the disclosure by the plea that the House of Commons has declared itself to have the power of publishing any report, vote or proceeding, the publication whereof it deems necessary or conducive to the public interests, to inquire whether by law the House has such power. Although not in form a plea to the jurisdiction, and wanting one essential incident to such a plea, if we answer this question in the affirmative, it would in effect lead to much the same consequences; we should not indeed dismiss the plaintiff from our Court to another tribunal competent to give him relief, for none such is alleged to exist, but we should give judgment against him ministerially, rather than judicially, on the ground that the act complained of was done in the exercise of a power as to which the whole jurisdiction, both to declare its existence and to decide on the propriety of its exercise in the individual case, was beyond our competence, and exclusively in the body by whom the very act was done. According to this argument, the plea in form leaves a matter for our decision, but in substance prescribes conclusively the judgment to be pronounced.

It must be admitted that this is a very startling conclusion; and certainly it must not be confounded with cases to which it has been likened, where the question in a cause turning upon foreign law, or any of those branches of our own law administered in Courts of peculiar jurisdiction, we

decide it not according to the common law, but according to what we suppose would have been the decision in the foreign or the peculiar Court. We are undoubtedly bound so to do: in one sense we have no discretion to do otherwise; that is, we cannot be influenced by any consideration, whether that decision would be satisfactory to our own minds as English or common lawyers; but still we exercise a judicial discretion, the same in kind as in deciding on a question of the common or statute law; for we inquire, by such lights as we can procure, what that law foreign or peculiar may be, and, when we have ascertained it, we apply the facts to it, and decide accordingly. Neither, again, is this to be confounded with cases in which, after an adjudication by a foreign or peculiar Court upon the same facts between the same parties, one shall bring the other before us in the way of original suit; then, indeed, and upon a distinct principle, if the fact of such adjudication be properly pleaded and proved or admitted, the further agitation of the question will not be permitted; we do not profess to decide upon the merits of the case—the existence of the former judgment in full force is by our own law itself a legal bar to the second recovery or a new agitation of the matter. We are now, however, called upon to abstain from all inquiry in a case in which the existence of the law is not substantively alleged in the plea (for as the House, it is admitted, cannot make the law, the resolution declaring it is only *evidence* of its existence, and not an *allegation* of it), where it does not appear that the particular facts have ever been adjudicated on, and where the particular order, under which the act complained of was done, is not distinctly brought within the law as said to have been declared.

All this, however, has been maintained upon the footing of privilege. It is said that the Commons have declared that they have this privilege, and the act has been done in the exercise of the privilege; but a Court of Law can neither inquire whether they have the privilege, nor whether the case falls within it, because the House of Commons

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alone is to judge of its own privileges; the Court, therefore, to use the words of the Attorney-General, "has nothing to do but to give judgment for the defendants."

Now it will be observed that one and the same reason, in terms, is here assigned for two widely differing conclusions, and it may therefore well be that the proposition may have two different senses, and be true in one though false in the other. No one in the least degree acquainted with the constitution of the country will doubt that in one sense the House alone is to judge of its own privileges; that in the case of a recognized privilege the House alone can judge whether it has been infringed, and how the breach is to be punished. This concession, however, will not satisfy the advocates of privilege, nor the exigencies of the defendants' case. The Attorney-General contends that the House is alone and exclusively judge of its own privileges, in the sense that it alone is competent to declare their number and extent, and that whatever the House shall resolve to be a privilege, is, by such resolution, conclusively demonstrated to have been so immemorially.

This proposition must be tried by the tests of principle and authority. And first, it is not immaterial to observe that privileges, though various in their kinds and effects, are all understood to be comprehended within the proposition; and I at once admit that no distinction can be made; for all privileges must be ultimately referred to the same source,—the effective discharge of those duties which, by the constitution, are cast upon the House of Commons. At the same time it is obvious that, in effect and in feeling, those privileges which become personal immunities to individual members, and those which are public and can be exercised only by the whole body in discharge of some public duty, are very different; and when we are considering on principle the reasonableness of the proposition contended for, it must not be laid out of sight that the same rule is to be extended to that which the pride, the passions and the self-interest of members may naturally be tempted to extend,

and to that which the whole body, for the efficient discharge of its great public duties, may have thought it requisite to demand of the Constitution. That this is not an idle apprehension the cases cited from the journals by the plaintiff's counsel abundantly demonstrate.

I next observe that the power to make any new privilege has been, as was necessary, distinctly disclaimed. The House, it is said, only acts judicially in declaring the Law of Parliament. We must, however, look to the substance of things; and as that cannot be done indirectly which it is unlawful to do directly, if it shall appear that the power claimed is in effect equivalent to that which is disclaimed, a strong presumption at least is raised against the validity of the claim. Now what, in effect, is the right to declare the extent of privilege conclusively but irresponsible and uncontrollable power to make it? At present we know, or we fancy we know, the limits of privilege, in certain cases at least: for example, we have been taught that the House of Commons cannot administer an oath to a witness. Let me suppose the House to resolve to-morrow that it has the power to do so, and that it is a breach of privilege to deny it;—if the Attorney-General's argument be correct, that power not merely is thenceforth, but from time immemorial has been inherent in the House; and every judge and lawyer must forget all that he has learned before, and is forbidden to inquire even into the previous acts or declarations of the same branch of the legislature upon the same subject. Although the Journals of the House might teem with conclusive proof that no such power existed, it would not be lawful for this Court to borrow light from them; it must acquiesce in the new declaration, and deny its relief to any one suffering under it. Yet what would be in effect the result, but that the House would have thus acquired for itself a power, which no lawyer could doubt it did not possess before? I have put a case drawn from within the range of those which fall under the admitted province of privilege; but the same reasoning will apply to cases en-

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tirely unconnected with it, cases which have really nothing to do with the duties or proceedings of the House. I would be easy to put striking instances of this kind, but they may be summed up at once, and without the least exaggeration, in the remark, that there is nothing dear to our property, liberty, lives or characters, which, if the proposition be true, is not *by the constitution* of the country placed at the mercy of the resolutions of a single branch of the legislature. Three answers, however, are made to such a supposition ;—first, it is said that paramount and irresponsible power must be lodged somewhere, and that it can nowhere be so safely lodged as with the representatives of the people ; secondly, that it is not seemly to presume, nor sound to argue from presumed abuses of power by so august a body ; thirdly, that in truth what has been urged by way of objection with regard to the House of Commons might equally be said in the matter of contempts of this or any other court of judicature.

As to the first, I would observe that by the theory of those advocates for privilege, *they* cannot argue this as a question of power ; they limit themselves in terms to jurisdiction ; they claim only an absolute jurisdiction ; I answer that this is in effect uncontrollable power : if they reply by an admission and a justification of that which I object, they must at least abandon their disclaimer of it, and acknowledge that they do in effect contend for the right, not merely to declare, but to make, privilege. But if they justify the claim by asserting that absolute and irresponsible power must be lodged somewhere, and that it can nowhere be so safely lodged as with the Representatives of the People, I take leave respectfully to dissent from both branches of the proposition. As to the first, I will not waste time by examining those extreme cases with regard even to the entire Legislature, on which, according to the theory of the Constitution even its so-called omnipotence is limited ; cases wisely not specified, nor in terms provided for ; because they are beyond the Constitution, and when they unhappily arise

resolve society into its original elements. But if the assertion be applied to any body in the state, or any Court for the administration of justice, civil or criminal, there is neither the one nor the other which by the Constitution claims absolute power in the sense in which it is now claimed for the Commons. Every question which comes before a court of justice must be one of law or fact, and, as to either, the decision may be wrong through error or corruption; but our Constitution has been careful, almost to an extreme, in providing the means of correcting it in both cases, and for punishing it in judge or jury, when it can be traced to corruption. It is true that as to errors in law there must be some limit to the series of Courts of Revision; and it is supposable that the Court of last resort may persist in the error of the original decision. But even in that extreme case the Constitution fails not, for the Parliament may then interfere (and has done so in some cases) to reverse and annul the erroneous decision.

Denying as I do the first branch of the proposition, it is not necessary for me, and would not comport with the profound respect which I feel for the House of Commons, to give my reasons for doubting the second.

But it is said, secondly, that the argument is founded on presumed abuse of power by the House of Commons; that such an argument is not sound in reasoning, nor seemly, as applied to so august a body. I agree that it is not seemly, and I disclaim the intention of using it; yet, when I am considering merely the antecedent reasonableness of the defendant's argument, I cannot pretend to forget what the Journals of the House have been shewn to contain, nor to be ignorant that it is of the very nature of irresponsible power, especially in the hands of a large body, to run to excess. I believe, however, that among those who now claim this power are the men who would be the very last to abuse it. But the truth is, that the answer is beside the question, for the cases are put merely to try the truth of a universal proposition, and by the strictest rules of reason-

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ing you may apply even extreme cases to test the truth of such propositions. My opponent in argument asserts that in all cases the House may declare conclusively that it possesses this or that privilege; I deny the truth of this cause, if true, the House would be able to commit itself to this or that monstrous act of tyranny or injustice; but in return either deny my assertion or admit it; if he does he will soon find that he must abandon his first claim if he admit it, then my argument is that, whether the consequence will happen seldom or often, or it may never, that cannot be law from which such a consequence may in natural course follow. To the third answer already given the necessary reply in considering this I will only in addition point out how wide the distinction between the declaration of the House of Commons on a matter of privilege, where itself is judge and party, and where the law provides no means of revision in any individual case, and the decision, even erroneous, even of a Court of Justice, between contending parties. I do not forget, but reserve for another place, the case of writs of habeas corpus for contempts, which will be found, both as regards the House and Courts of Justice, to fall more properly under a different consideration.

But it is said that this and all other Courts of Law are inferior in dignity to the House of Commons, and that therefore it is impossible for us to review its decisions. My argument appears to me founded on a misunderstanding of several particulars: first, in what sense it is that this Court is inferior to the House of Commons; next, in what sense the House is a Court at all; and lastly, in what sense we are now assuming to meddle with any of its decisions. Vastly inferior as this Court is to the House of Commons when considered as a body in the state, and amenable to the members may be for ill-conduct in their office to its impositions, and certainly are to its impeachment the Lords, yet as a Court of Law we know no superior to those Courts which may revise our judgments for

and in this respect there is no common term of comparison between this Court and the House. In truth, the House is not a Court of Law at all, in the sense in which that term can alone be properly applied here; neither originally nor by appeal can it decide a matter in litigation between two parties; it has no means of doing so, it claims no such power: powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts. As to them no question of degree arises between Courts, and in the only sense, therefore, in which this argument would be of weight, it does not apply. In any other sense the argument is of no force; considered merely as resolutions or acts I have yet to learn that this Court is to be restrained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, where the rights of third persons in litigation before us depend upon their validity. But I deny that this inquiry tends to the reversal of any decision of the House; the general resolution and the *res judicanda* are not identical; the House of Commons has never decided upon the fact on which the plaintiff tendered an issue; that argument will be found by-and-bye to apply to the cases of committal for contempt, but it has no place in the consideration immediately before me.

Again, it is said that the jurisdiction of the House must be exclusive, because it proceeds not by the Common Law, of which alone we are cognizant, but by a different law, the parliamentary law, of which we are wholly ignorant. I cannot think that this argument is entitled to much weight. It is every day's practice with us to decide cases which turn upon the laws of foreign countries, or the laws administered in Courts of peculiar jurisdiction in this country: of these we have no judicial knowledge, but we acquire the necessary knowledge by evidence. And it is not denied that, where in a cause the question of privilege arises incidentally, this Court must take notice of it and inquire into its existence and extent; what therefore it must do in some cases

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where the same difficulty exists, there can be no impossibility on that account of its doing in all.

This objection, however, leads me to observe that cases of privileges, so called, will often arise, where the question will be not merely whether the privilege does exist, whether the claim made can be reduced at all under the true definition of privilege. Privilege, if it be any thing but the mere declaration of the present will of the body claiming it, must be capable of some general fixed definition, however it may vary in degrees in different bodies. No lawyer, I suppose, now supports the doctrine of *Blackstone* (a), that the dignity of the Houses, and their independence, are in a great measure preserved by keeping their privileges indefinite. But of privilege in the general, we must be competent to form some opinion, because we have from time to time to deal with our own privileges.

I now suppose, by way of illustration, an extreme case: the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish; an arrest is made, and action brought to which the order of the House is pleaded as a justification. The Attorney-General has said that it is always a question of privilege, when it is a question whether the House has power to order the act complained of to be done, and that this question arises directly whenever it appears by the record that the action is for that which the House has ordered to be done. In such a case as the supposed one, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer seriously doubts that it exists; but the argument confounds them, and forbids us to inquire in any particular case whether it ranges under the one or the other. I can find no principle which sanctions this.

I proceed now to examine a few, and but a few, of the very numerous authorities cited on this question; it does

(a) 1 Comm. 164.

not appear to me at all necessary to go through many, for whatever may be the weight of instances of acquiescence by individuals in the acts of the House of Commons, and, generally speaking, I consider it to be little or none, it is not so between the House of Commons and the Courts of Judicature. The House has for centuries been feelingly alive upon questions of privilege, and for centuries it has been the most powerful body in the state; if, therefore, I find, in several well-considered cases, the Courts disclaiming to be bound by the resolutions of the House as to their privileges, and actually adjudicating upon them without any or only with ineffectual remonstrance, I cannot but think such instances entitled to the greatest respect, and to be of quite sufficient force to establish a proposition which in itself is so consonant to reason.


I know it will be said that, in many of the cases alluded to, the question of privilege has arisen incidentally only, and that in such, *ex necessitate*, the Courts have interfered. In what sense "incidentally" is here used, has been often asked, and never as yet quite satisfactorily answered; in what sense a greater necessity exists in the one case than the other has not been made out. The cases of *habeas corpus* are generally put as instances, where the question arises directly; let me suppose the return to state a commitment by the Speaker under a resolution of the House, ordering the party to capital punishment for a larceny committed,—it will hardly be said that a stronger case of necessity to interfere could be supposed, and yet it must be admitted, on the other hand, that the question of privilege or power, between which the argument for the defendants makes no difference, would arise directly. A case, therefore, may be supposed, in which it would be necessary to interfere, even where the so doing would be a direct adjudication upon the act of the House. It should seem, then, that some other test must be applied to ascertain in what sense it is true that the House can alone declare and adjudicate upon its own privileges.

I venture with great diffidence to submit the view which

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I have taken on these embarrassing questions, not as ing the suspicious merit of novelty, but as one which at least, remove all difficulties in theory, and be for believe, not inconsistent with the general course authorities. I say general course, for during so series, carried through times so differing in politics and between such parties as either House of Parliament the one side, and the Courts of Law, individual Judges litigant suitors on the other, it would be quite idle to that any one uniform principle should be found to invariably prevailed. In the first place, I apprehend the question of privilege arises directly wherever the House has adjudicated upon the very fact between the parties there only; wherever this appears, and the case *may* of privilege, no Court ought to inquire whether the House has adjudicated properly or not; but whether directly ing, or not, a Court of Law, I conceive, must take of the distinction between privilege and power; and the act has not been done within the House (for if there done can any tribunal, in my opinion, take notice but the House itself), and is clearly of a nature transcending the legal limits of privilege, it will proceed against the doer as a transgressor of the law.

To apply these principles to the cases in which, on return to a *habeas corpus*, it appears that the House committed for a contempt in the breach of its privilege subscribe entirely to the decisions, and I agree also the dicta which, in some of them, the Court has thrown on supposed extreme cases. In every one of these the House has actually adjudicated on the very point in the return, and the committal is in execution of its judgment. In all of them the warrant or order has set out which on the face of it either clearly is or may be a breach of privilege, or it has contented itself with stating the person to have been guilty of a contempt, without specifying the nature of it, or the acts constituting it. *Brass Case* (a) is an instance of the former; *Lord Shaftesbury*

(a) 3 Wilson, 188.

(b) 1 Mod. 144.

of the latter. The difference between the two is immaterial on the present question, which is one of jurisdiction only—although in the case of an inferior Court, over which this Court exercises a power of revision and control even in matters directly within their cognizance, it will require to see the cause of committal in the warrant; yet, with regard to Courts of so high a dignity as the Houses of Parliament, if an adjudication be stated generally for a contempt, as contempts are clearly within their cognizance, a respectful and a reasonable intendment will be made that the particular facts on which the committal in question has proceeded warranted it in point of jurisdiction; for the propriety of the adjudication, that being assumed, would of course not be to be inquired into. But in both cases the principle of the decision is, that there has been an adjudication by a Court of competent jurisdiction. Thus, in the former, *De Grey*, Chief Justice, says, “When the House of Commons *adjudge* any thing to be a contempt or a breach of privilege, their *adjudication* is a *conviction*, and their commitment in consequence is *execution*, and no Court can discharge or bail a person that is in execution by the judgment of any other Court. The House of Commons, therefore, *having an authority to commit*, and that commitment being in execution, the question is, what can this Court do? It can do nothing when a person is in *execution by the judgment of a Court having a competent jurisdiction*; in such case this Court is not a Court of appeal.” And in the latter, on which the main contest was on the generality of the order of the Lords, *Rainsford C.J.* says, “The commitment in this case is not for safe custody, but he is *in execution on the judgment* given by the Lords for the contempt, and therefore if he be bailed, he will be delivered out of execution, because for a contempt *in facie Curia* there is no other judgment or execution.”

The same principle will explain and justify the observations which have been made by different Judges from time to time with regard to supposed cases even of direct adju-

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dication, and if it should appear that the vice objected to the proceeding is not of improper decision or excess of punishment, but a total want of jurisdiction—in other words, where it is contended that either House has not acted in the exercise of a privilege, but in the usurpation of a power—it cannot be doubted that the same Judges who were most cautious in refraining from interfering with privilege, properly so called, would have asserted the right of the Court to restrain the undue exercise of power. The fact of adjudication, then, has no weight, because the Court adjudging had no jurisdiction. Many such instances have been referred to in the argument. I pass over the luminous, and as I think still unanswered, judgment of Lord *Holt*, in *The Queen v. Paty* (a), which is bottomed on this principle; but I will cite, by way of illustration, the dicta of Lord *Kenyon* and Lord *Ellenborough*, whom I select not only for their pre-eminent individual authority, but also because I can cite from their judgments in cases in which they were with a firm and favourable hand upholding the just privileges of the Commons; and it is satisfactory to see that the distinction was even then present to their minds. Lord *Kenyon*, in *Rex v. Wright* (b), after saying “this is a proceeding by one branch of the legislature, and therefore we cannot inquire into it,” immediately qualifies the generality of that remark by adding, “I do not say that cases may not be put in which we would inquire whether or not the House of Commons were justified in any particular measure; if, for instance, they were to send their serjeant-at-arms to arrest a counsel here, who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action; undoubtedly we should pay no attention to it.” In each case here supposed there would have been a direct adjudication upon the very matter, and in each there would have been a claim of privilege; but the facts would have raised the preliminary question, whether privilege or not; into that inquiry

(a) 2 *Ld. Raym.* 1012(b) 8 *T. R.* 296.

Lord *Kenyon* would have felt himself bound to enter, and when he had satisfied himself that there was no such privilege, the fact of adjudication would have become immaterial. So in the most learned and able argument of *Holroyd* in *Burdett v. Abbot* (a), when he had put a case of the Speaker issuing his warrant, by the direction of the House, to put a man to death, Lord *Ellenborough* interposed, thus: "*The question in all cases would be, whether the House of Commons were a Court of competent jurisdiction for the purpose of issuing a warrant to do the act. You are putting an extravagant case. It is not pretended that the exercise of a general criminal jurisdiction is any part of their privileges. When that case occurs, which it never will, the question would be whether they had general jurisdiction to issue such an order; and no doubt the Courts of Justice would do their duty.*" This case again supposes an adjudication; but can language be more clear to shew the undoubting opinion of that great Judge, that it would have been still open to this Court to inquire into the jurisdiction of the House; and can any one seriously believe that the fact of a previous declaration by the House that they had such jurisdiction would have been considered by him as shutting up that inquiry?

Again, the same principle relieves me from all difficulty as to cases where at first sight the question appears to arise less directly, but where still the Court of Law would have to determine the case before it upon facts already directly adjudicated upon by the House. Such was the celebrated case of *Burdett v. Abbot* (a), in the decision of which I most heartily concur. There the action was trespass *quare clausum fregit*, and assault and false imprisonment, but the defence was a procedure in execution on a sentence of the House of Commons—if that sentence were pronounced by a competent Court, it warranted all that was done;—the only question that could be made, upon any principle of

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(a) 14 East, 128.

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law, was the competency of the adjudicating Court. The competency of the House to commit for a contempt, being not seriously doubted, there was a direct addition, into the propriety of which this Court would inquire. It could not inquire into it without trying again what had already been decided in the House, whether Sir *Francis Burdett* had been guilty of a contempt; but this would have been contrary to the plainest principle of law. That this was the true principle of decision is seen most simply from the narrow question put to the Court by the Lords, and the short judgment of Lord *Eldon*. When the case came before the House on writ of error (a).

Neither have I any difficulty with any of the cases in which the question arises upon any thing said or done in the House. In point of reasoning it needed not the declarative declaration of the Bill of Rights to protect the freedom of speech, the debates or proceedings in Parliament from impeachment or question in any place out of Parliament; and that the House should have exclusive jurisdiction to regulate the course of its own proceedings, and not to advert upon any conduct there in violation of its rights, or derogation from its dignity, stands upon the clearest ground of necessity. The argument, therefore, with which the defendants were pressed, that, if the defendants were liable in an action, the Speaker who signed the order for printing the resolutions, the members who concurred in the resolutions, must be equally liable to be sued, on the ordinary principle of master and servant, has no foundation. It cannot be necessary to dwell on a distinction so well established: on the other hand, no conclusion in favour of the defendants can be drawn from the immunity of the Speaker or the members in respect of any thing done by them in the House, which occasioned the publication of the libel complained of. The order may be illegal, and therefore no jurisdiction to him who acts on it without; and yet the Common Law may be unable to penetrate the walls of the House.

(a) 5 Dow, 199.

and give redress for any thing done within; just as the individual who executed an illegal order of the monarch would be responsible, although the constitution would allow of no proceeding against the monarch himself.

And now, having made these limitations clear, I would ask whether, subject to them, there is any reasonable doubt that it has been the practice of the Courts to inquire into questions of privilege; a practice, considering all the circumstances, prevailing with remarkable uniformity, and traced from very early periods. It would be impossible for me, within any reasonable limits, to go through the series of recorded cases, and after the judgments already pronounced, must be quite unnecessary, although to specify only a few may seem as if they alone were relied upon. The cases of *Donne v. Walsh* (a), 12 *Edw.* 4, and of *Ryver v. Cosins* (b), in the same year and same book, are important, as showing that at that early period, when the supersedeas of a cause was to depend on the extent of the parliamentary privilege, the inquiry was left to the judges of the Court in which the cause itself was pending—in both instances the barons of the Exchequer take to counsel the judges of either bench, and finding *quod non habetur nec unquam habebatur talis consuetudo*, as that relied on for the supersedeas, disallow it, and order the defendant to answer to the declaration.

Ferrers' case (c), in the reign of *Henry* the Eighth, is noticed by *Mr. Hatsell*, p. 53, as being the first instance in which the House of Commons took *upon themselves* to vindicate their privilege of freedom from arrest. And when that case is read at length, one cannot but observe indications of their proceeding, as if in the exercise of an untried power, with uncertain and somewhat inconsistent steps. The House is inflamed by the imprisonment and detention of their member, and the violent resistance to the Serjeant; but what is their first step? They all retire to the Upper

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(a) 1 Hats. 41.

(b) 1 Hats. 42.

(c) 1 Hats. 53.

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House, the Speaker states their grievance, the Ch and the Judges consider the matter, and "judging t tempt to be very great," refer "the punishment there order of the Commons' House." Then the membe released, and the offenders against privilege having ted and been punished, an act of parliament pass long debate, touching the member's debt; the King to the Parliament and descants in large terms up privileges, founding himself on the information of his Counsel, and the whole is concluded by the Lon Justice "very gravely" declaring "his opinion confir divers reasons all that the king had said." *Dyer*, an *Anonymous case* (a), states the law as to one of 1 vileges of parliament, refers to this case, saying, "it was held *by the suges of the law* in the case of one in the time of *Henry the Eighth*."

Cases and language such as the preceding, seem to furnish the key to the true meaning of the exp to be found in *Thorp's case*, and the 4th Inst. (b), or so much reliance has been placed by the defendants. the Judges in that case speak of "a High Court liament, so high and mighty in its nature *that it ma lawe*, and *that that is lawe it may make no lawe* cannot truly be speaking of either or both House when they say, "that the *determination* and *knowl* that privilege belongeth to the Lords of Parliame not to the Justices," it would be inconsistent with th ral course of authorities to suppose they meant to re themselves as really ignorant of the law of parliar privilege; and also with their going on immediatel form the Lords as to the course adopted with re parliamentary privilege in the Courts below. Th tion, indeed, was one of privilege between the two and the person of the Duke of York on the one ha the Speaker on the other; and the Judges, advisers Peers as to all matters of Common Law, decline to

(a) Moore, 67.

(b) 4 Inst. 15.

the Lords how to decide that question there; and this, considering the times and the power of one of the litigants, with no very blamable reserve; at the same time, they inform them of their own course of decision in such cases arising in their own Courts below.

Benyon v. Evelyn (a) has been so much discussed during the agitation of this question, that I shall only refer to it; but I was indeed surprised to find it treated in the argument as bearing very lightly on the question, and the judgment of the Lord Chief Justice therein characterized as a mere idle display of learning unnecessary to the decision of the cause. That, indeed, was not a case in which the House took any part, and the privilege was sought to be used against the member; but how these circumstances detract from the effect of that decision, as shewing the constant interference of the Courts of Law in questions of privilege, I do not understand. If, indeed, it can be shewn that the cases there relied on are unfairly selected or unfaithfully reported, or if any sound distinction can be shewn between the free discussion of one branch of the privilege of the House and that of another, the judgment there may not press upon the defendants; if these cannot be shewn, and it was not attempted in the argument, it is all but decisive of the question.

The great case of *Ashby v. White* (b), decided by the Court of last resort, and the modern but *well-considered* cases in Chancery of *Mr. Long Wellesley* (c) and *Lechmere Charlton* (d), are all that I will further mention, and I will only mention them by name. Indeed, with the opinion which I have upon the state of the authorities on this question, I seem to myself to have dwelt longer than I ought to have done on this part of the case. Limiting the interference of Courts of Law with the privileges of the House of Commons as I have done in the earlier part of my remarks, it appears to me to be quite unquestionable.

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(a) O. Bridgman, 324.

(b) 2 Ld. Raym. 938.

(c) 2 Russ. & M. 639.

(d) 2 Myl. & Cr. 316.

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The less important question raised by the plea but still a cardinal one to the decision of the case, remains to be considered as shortly as I can; has the House of Commons the privilege of publishing and selling indiscriminately to the public whatever it orders to be printed for the use of the members? or, conceding the resolution and order just stated to be identical in effect with the resolution, of uncertain date, stated at the end of the plea (which yet, considering their language, is a wide concession to make), is the power of publishing such of its votes, reports and proceedings as it shall deem necessary or conducive to the public interests, an essential incident to the constitutional functions of the Commons House of Parliament?

The burden of proof is on those who assert it, and for the purposes of this cause the proof must go to the whole of the proposition; its truth as to the votes, or even to some of its proceedings, will not suffice. Now, we have been referred to the Report of the Committee on the publication of Printed Papers, and with some emphasis we have been informed of the names of the individual members; the industry displayed in the former, and the well-known learning and ability of the latter are such, that we may safely say, if the proposition has not been demonstrated it cannot be—

“ Si Pergama dextrâ

Defendi possent, etiam hâc defensa fuissent.”

One thing is remarkable in this controversy; the privileges of Parliament at different periods have engaged largely the attention of political writers, and Parliament has never wanted zealous assertors to enumerate them; and no one can doubt of the extreme importance of this branch of them if it had never existed. I look to the Report for authorities of this class, and I find it a perfect blank. If any thing could be added to that Report, the argument for the defendants, it may be safely asserted, would have supplied it; that is equally a blank on this head. Nor am I able—and my brother *Patteson*, with far wider research, tells us that he is not able—to supply any authority to this

effect. It is difficult to explain this in any manner consistently with its being a recognized privilege; general acquiescence might explain why there was no *case* to be found in support of it, but for the very same reason one should have expected to have found it enumerated in some or all of the text-writers who have had to deal with the subject of privilege.

But if not to be found in such works, nor evidenced by any resolution of the House prior to that of 1837, does it stand more securely on the testimony of the Journals and proceedings of the House? It cannot be denied that the Journals present evidence of the exercise of the right of publication. The question is, whether all things considered, and specially the nature of the right on the one hand and the imperfect state of the early Journals on the other, it is sufficient in reason to establish its existence. For about the first century of the Journals, from 1547 to 1641, nothing appears on the subject; but the time and occasion of the commencement of the precedents relied on, and the early precedents themselves, are far more unfavourable to the right than the previous want of any. The time is 1641, the occasion the unhappy difference between the Sovereign and the House, the precedents themselves direct acts moving in and towards the Great Rebellion. Mr. *Hatsell*, closing his first part, says, "If I shall ever have leisure or inclination to continue this work, I shall think myself obliged to pass over every thing that occurred after this unhappy day" (the entrance of the king into the House), "and shall collect only such precedents as are to be met with" in the two Parliaments of 1640 "till the 4th January 1641, and then proceed directly to the Restoration (a)." And I cannot but think that this part of the defendants' case would have stood better if the same discretion had guided the industry of those who collected their precedents, and if no reliance had been placed on these violent and irregular proceedings.

(a) 1 Hats. 218—223.

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Passing from this inauspicious opening to the year 1660, and thence to the year 1835, I do not doubt that in a great many instances the House of Commons is shewn to have printed and published votes, reports and proceedings,—the votes, indeed, with considerable regularity; but as to the first of these the right to publish is undisputed, and stands on a ground which leaves this question untouched. The term “proceeding” is so vague that I am unwilling to pronounce any opinion upon the right as to them generally but no doubt there are many things fairly reducible under that term, which the House would have the right to publish; and as to their Reports a large proportion of them would contain nothing criminary of individuals, so as to raise no question upon the right. Now, when the necessary deductions are made in respect of all these considerations, and when, besides, we allow for the reluctance which individuals would have to litigation with so formidable an adversary as the House, even where the criminating matter in a report was false, and that it would be doubled where the matter was true, which in many instances it must in reason be taken to have been, the residuum of the evidence, which may be fairly considered to support the right claimed, is so small as entirely to fail in making it out. We have been obliged in this case to refer to what looks like evidence in fact, in order to ascertain the law, and evidence naturally bears with a different weight on different minds; I speak of my own impression; and considering it merely as a question of evidence, I frankly avow that what has here been collected gives the claim to my mind the character much more of usurpation than lawful privilege.

But it may be said that necessity, or at least a strong expediency, proves the existence of the privilege, for they are the foundation of all privilege.

These may be essential to privilege; but I must take leave to deny that alone they can constitute it. The House of Commons is sometimes called the grand inquest of the nation, and to the discharge of its duty as such, who can

doubt that the power to examine witnesses upon oath would be most conducive? to the perfect discharge of that duty who can doubt that in early times it was thought essential? yet there is nothing clearer than that the House has not that power, and cannot by its own resolutions acquire it. The author of Junius's Letters, I think, lays down a safer rule: "To establish a claim of privilege in either House, and to distinguish original right from usurpation, it must appear that it is indispensably necessary for the performance of the duty they are employed in, and *also that it has been uniformly allowed.*"—Letter XLIV.

Were I therefore to concede the necessity, or the strong expedience, one half only of the defendant's case would be made out; the objector would still appeal to the defective evidence of allowance, and the rule would hold "*bonum ex causâ integrâ, malum ex aliquâ parte.*" But I do not feel that I can make that concession. I will not put this upon the ground of inconsistency in the urging this argument for a body whose most undoubted and exercised privilege it is to exclude the public at pleasure from their debates; but recollecting the great inconvenience of all injustice, the great advantage of maintaining the principle that even public benefits are not to be purchased by a violation of the sacred rights of individuals; recollecting how nearly all, if not all, the benefit of publicity may be secured even when it is confined to matter not crimivatory, I assert with the greatest confidence that the balance even of public expediency is in favour of a right of publication, restricted by the Courts of the Common Law. What advantage derived from publicity can be equal to the maintenance of the principle, that even to the representatives of the people, the most powerful body in the nation, the calumny of individuals is forbidden? What benefit can countervail the evil of a general understanding that any man's character is at the mercy of that body, and that *by the law* not merely by the force of overbearing power, but by the rule of English law, for the sake of public expediency he may be slandered

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without redress? I desire to avoid language that may have the semblance of offence; but I soberly ask the warmest advocate for this extended privilege, whether any benefit in a land, all the institutions of which seek the genial sunshine of public opinion, and must languish without it, can make up for the injury resulting from this, that it should be capable of being said with truth, the House of Commons has become a trader in books, and claims as privilege a legal monopoly in slander?

If then, I try this claim by the authority of text writers, by the evidence of precedents, by the test of expedience or necessity, it seems to me in each and all of these to be signally wanting. I am therefore of opinion that the plaintiff is entitled to our judgment. I could wish that I had leisure to express my reasons more concisely and more clearly; I have examined the question, however, with an anxiety proportionate to its importance, and with a deep sense of the responsibility attaching to the decision; but I cannot say that I entertain the least doubt of its correctness.

We have been warned of the danger of a pursuit after popularity—advice no doubt tendered in a respectful and friendly spirit—advice most useful where needed; I trust that nothing we have said or done can fairly lay us open to the imputation of needing it. For myself, I am afraid to quote a passage from the eloquent appeal^(a) of a great predecessor of my lord, lest any one should suppose me weak enough to be thinking of a comparison with Lord Mansfield; but I feel the distinction between the popular favour that follows an honest course and that which is followed after.

To speak of a contempt of the House, if “we assume to decide this question inconsistently with its determination,” argues what I should call, if the language had not been used by those whom I am bound to revere, a strange obliquity of understanding. The cause is before us; we are sworn to decide it according to our notions of the law; we do not bring it here; and being here, a necessity is laid

(a) Judgment of Lord Mansfield C. J. in *Rex v. Wilkes*, 4 Burr. 2562.

upon us to deliver judgment ; that judgment we can receive at the dictation of no power : we may decide the cause erroneously, but we *cannot* be guilty of any contempt in deciding it according to our consciences.

The privileges of the House are my own privileges,—the privileges of every citizen of the land ; I tender them as dearly as any member possibly can ; and so far from considering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affections of the people.

Judgment for plaintiff (a).

(a) A writ of inquiry issued upon this judgment, upon which the plaintiff recovered 100*l.* damages.

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The QUEEN v. LUMSDAINE.

Saturday,
April 27th.

ON appeal by the defendant to the Midsummer Quarter Sessions, 1838, for the county of Dorset, against a rate, made on the 2nd June in that year, for the relief of the poor of the parish of Wimborne Minster, in that county, the Sessions confirmed the rate, subject to the opinion of this Court on the following case :

The rate, which was in the form prescribed by the 6 & 7 Will. 4, c. 96, and the rules of the Poor Law Commissioners, was published as required by the statute. No stock in trade was rated in the said rate. There was considerable stock in trade, yielding profit, in the said parish, at the time when the rate was made. The parish contains 12,000 acres or thereabouts, rateable to the relief of the poor. In the year 1833, stock in trade not having been included in a rate, made on the 3d day of May in that year, for the relief of the poor of the said parish, an appeal was entered at the then ensuing Midsummer sessions, on the ground that stock in trade, yielding profit within the parish, was not included

Stock in trade, yielding profit, being rateable to the relief of the poor, under 43 *Eliz.*, is not exempted by the (Parochial Assessment Act) 6 & 7 Will. 4, c. 96.

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in the said rate. The hearing of the appeal was adjourned to the then next sessions, when the respondents abandoned the said last-mentioned rate, and it was quashed, and a new rate was made on the 28th February, 1834, in which stock in trade was assessed. From that time stock in trade continued to be regularly rated in the said parish down to the month of June, 1835, inclusive. It appears from the rate books of the said parish, that stock in trade had not been rated therein from the year 1796 until the said rate of February, 1834, and there was no evidence of stock in trade having been rated in the parish previously to 1796. Stock in trade has not been assessed in the said parish since the month of June, 1835.

The question for the consideration of this Court is, whether stock in trade, yielding profit in the said parish, ought or ought not to have been assessed in the said rate, made on the 2d day of June, 1838: and if this Court should be of the former opinion, then the order of sessions and the rate are to be quashed.

Sir *J. Campbell* A.G., *Stock* and *Reud*, in support of the order of sessions. It was for a long time considered doubtful whether stock in trade was rateable under the 43 *Eliz.*: *Rex v. Witney* (a) and *Rex v. Ringwood* (b): but since the decisions of *Rex v. Hill* (c), *Rex v. Darlington* (d), and *Rex v. Ambleside* (e), it may be difficult to contend that such stock is not rateable under that statute. The present question is raised by the recent parochial assessment act, the 6 & 7 *Will* 4, c. 96, which shews a manifest intention to exempt personal property from contribution to the poor-rate; and if it has not repealed the 43 *Eliz.* c. 2, in this respect, has at least put a construction upon it which the Court is bound to follow. The statute of *Eliz.* itself did not expressly make personal property rateable: a construction to that effect was put upon it by the Courts, the language of the legislature being equivocal; and the Parochial Assessment Act being a decla-

(a) 5 Burr. 2634.


(c) Cowp. 613.

(b) Cowp. 326.

(d) 6 T. R. 468.

(e) 16 East, 380.

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natory act in *pari materia*, puts an interpretation upon those equivocal words paramount to any put by the decided cases. The preamble recites that it is desirable to establish one uniform mode of rating throughout the country; and it is then enacted, in the first section, that after a certain date no poor-rate shall be valid which shall not be made upon an estimate of the net annual value of the "several *hereditaments* rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year," &c. A house therefore may be rated though it may be leasehold, because the land on which it is built is a hereditament. Sect. 2 enacts "that every such rate made after the said period shall, in addition to any other particular, which the form of making out such rate shall require to be set forth, contain an account of every particular set forth at the head of the respective columns in the form given in the schedule to this act annexed, &c." Under the head of "Description of property rated," in that schedule, nothing is to be found but real property, as "land and buildings," "house and garden," "house;" and the "other Particulars" mentioned must refer to matter of form only, and not to a different subject-matter. The 3rd section also relates to the survey and valuation of property, and is not applicable to personalty. The very preamble of the statute states it to be made to establish one *uniform* mode of rating, and to lessen the cost of appeal against an unfair rate. The Preamble of a statute cannot control the enacting part of a statute, if expressed in clear and unambiguous terms. But if any doubt arises on the words of the enacting part, the preamble may be resorted to to explain it: per Buller J. in *Crespigny v. Wittenoom* (a). Before this act there was undoubtedly great want of uniformity in rating, stock in trade and shipping being rateable by custom in some places, but not in others; and it may be observed, in passing, that there has been no custom to rate stock in trade in the parish of Wimborne. The objects of uniformity and of lessening

(a) 4 T. R. 793.

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the costs of appeal will be best effected by holding that real property only is rateable; otherwise, as the act relates to such property only, the 6th section, which makes provisions for lessening the costs of appeal, will be inoperative where personalty is rateable. The Court may hold that the statute of *Eliz.*, as to the rating of personalty, is repealed, consistently with the general rules for the interpretation of statutes, although the 6 & 7 *Will.* 4, c. 96, is affirmative: *Slade v. Drake* (a), *Rex v. Worcestershire* (b), *Rex v. Coode* (c), and *Foster's Case* (d).

At all events, the Court will not quash this rate, as it is in accordance with the statute, and in the form prescribed.

W. Bond, Bere and Lucena, contra, were not called by the Court.

LORD DENMAN C. J.—It may be that the legislature intended, by the Parochial Assessment Act, to repeal so much of the statute of *Eliz.* as rendered personal property rateable; but they have not carried such an intention into effect. The observation, that this rate is good because personalty is rateable, would apply to every case where there was an assessment of a party rateable. The object of the recent Act appears to have been to establish a new mode, and not a new principle of rating. The columns in the form given in the schedule certainly seem applicable to real property, and the word “hereditaments,” descriptive of the subject of rating, is prominent in the body of the act; it is said that the Act amounts altogether to a declaration that personal property is not to be rateable as theretofore. But such a declaration has not been made; and indeed something more than a declaratory act might be expected after express decision that personal property is rateable. There is no positive language to exclude any of the former subjects of rating; the old law must be taken to continue unrepealed.

(a) Hob. 298.

(b) 5 M. & S. 457.

(c) Cald. 464.

(d) 11 Rep. 56 b.

LITTLEDALE J.—The 43 *Eliz.* c. 2, embraces two classes of persons as rateable to the relief of the poor; first, “every inhabitant, parson, vicar and other,” which includes all the inhabitants of a parish; secondly, “every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods, in the said parish.” It has been held that holders of personal property come within the former class, so as to be rateable, although, as far as the decisions have hitherto proceeded, stock in trade and shipping are the only kinds of such property which have been held rateable. The 6 & 7 *Will.* 4, c. 96, cannot, it appears to me, be considered a declaratory act; it contains no declaration whatever respecting the first class of persons rateable under the act of *Eliz.*; it makes some particular provisions for rating the second class, namely, occupiers, and leaves the first class quite at large.

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PATTESON J.—It is clear that under the statute of *Eliz.* personal property, if visible and profitable, is rateable; and was expressly held to be so by Lord *Ellenborough*, in *Rex v. Ambleside* (a). As to the 6 & 7 *Will.* 4, c. 96, I doubt much whether any alteration was intended in the law as to the rateability of personal property; certainly none has been made. The object was merely to establish a uniform mode of rating; and it will be recollected, from the case of *Rex v. Joddrell* (b), how the law stood before the passing of the act.

COLERIDGE J.—The argument is, that in the 6 & 7 *Will.* 4, c. 96, there is to be collected a clear intention to repeal the statute of *Eliz.*; I say to repeal the statute of *Eliz.*, because it has been frequently held that personal property is rateable under that act, although the judges have at times shewn great reluctance in coming to that conclusion. If there had been an intention to alter the law, it might

(a) 16 East, 308.

(b) 1 B. & Ad. 403.

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have been done by two words. It may be that the of the act were fearful that it would not pass if it att to exempt personal property. The provisions of the all directed to effect a uniform mode of rating real pr it would naturally therefore be silent as to any oth perty.

Order of Sessions qua



The QUEEN r. The Inhabitants of DRAUGHTON

The 4 & 5
Will. 4, c. 76,
s. 81, makes
no alteration
in the time,
fixed by the
existing prac-
tice of ses-
sions, for giv-
ing notice of
appeal against
orders of re-
moval.

ON appeal to the sessions held, April 2d, 1838, West Riding of Yorkshire, against an order for the of *John Spencer* and family, from the township of Dra to the township of Bishop Thornton, both in t Riding, the sessions discharged the order, subject opinion of this Court upon the following case:

The appellants, having been called on to prov notice of appeal, proved the service of such notice 19th March, 1838. It was thereupon objected respondents that such notice was not in time, for was not given "fourteen days at the least before t day of the sessions," which were held on the 2d 1838. The Court however held such notice to be i and having heard evidence on both sides, dischar order. The question for the opinion of this Co whether such notice was given in time, pursuant to Will. 4, c. 76, s. 81. If this Court shall be of opini such notice of appeal was given in time, the order sions to stand, otherwise the original order to be cor

May 29th.

Wortley and *J. Ingham*, in support of the order sions. *Rex v. Suffolk* (b) decided that the prac sessions, as to the time for giving notice of appeal

(a) This and the following case
were decided in Trinity term, 1839.

(b) 4 A. & E. 319.

an order of removal, is not affected by the New Poor Law Act. In *Rex v. Salop (a)*, the Court reluctantly decided that the statement of the *grounds* of appeal must be delivered fourteen *clear* days before the first day of sessions, but that decision has nothing to do with *notice* of appeal. It may be reasonable that the grounds of appeal should be delivered early, for the information of the adverse party, *in case* there should be an appeal, and yet that the final determination, to be announced by the notice of appeal, should be postponed.

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Sir G. Lewin, *contra*. The legislature evidently meant that the notice and grounds of appeal should go together. The 4 & 5 Will. 4, c. 76, s. 81, provides that, where notice of appeal shall be given against an order of removal, the appellants "shall with such notice, or fourteen days at least before the first day of the sessions, at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing of the grounds of such appeal." The 79th section provides that no pauper shall be removed until twenty-one days after notice of chargeability, and that, if within these twenty-one days, notice of appeal shall be received, he shall not be removable until the time for prosecuting such appeal shall have expired. And *Rex v. Suffolk (b)* was argued on the ground that the notice of appeal must be given within the twenty-one days after notice of chargeability. [Williams J. The judgment of Lord Denman C.J. there seems decisive upon the present point.] The present case is argued upon a different ground from the former, namely, that, as the statute requires that the *grounds* of appeal should be furnished fourteen days at least before trial, and as they would be insensible unless accompanied or preceded by *notice* of appeal, the statute impliedly requires that the notice also should be given either previously or at the same time. In

(a) 3 N. & P. 286.

(b) 4 A. & E. 319; S. C. 5 N. & M. 503.

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this case notice was not given fourteen *clear* days before trial, and was too late. The object of the legislature was to give the respondents time to inquire into the grounds of appeal and to prepare for trial, but they can hardly be expected to do so before they have been apprised by the notice of appeal that a trial is really intended.

Lord DENMAN C. J.—The implication contended for is not at all necessary to the construction of the act. Notice of appeal may by the practice in some places be required more than fourteen days before the sessions, in which case the grounds of appeal may be sent with the notice; in other cases, where so long a notice is not required, the alternative is provided, that the grounds of appeal should be sent to the respondents fourteen days before the sessions. There is no provision as to the time of notice itself.

LITTLEDALE, PATTESON and WILLIAMS Js. concurred.

Order of sessions confirmed.

**The QUEEN v. The Guardians of the WALLINGFORD
UNION (a).**


Guardians of a union are rateable for a workhouse, erected under 4 & 5 Will. 4, c. 76, in one of the parishes of the union, to the poor-rate of the parish in which the house is situated.

ON appeal to the Berkshire sessions in April, 1838, against a rate made the 4th January in the same year, for the relief of the poor of the parish of St. Mary the More, in the borough of Wallingford, the sessions confirmed the rate subject to the opinion of this Court on the following case :—

On the hearing of the appeal it was proved that the respondent parish and twenty-eight other parishes together form one union, pursuant to the 4 & 5 Will. 4, c. 76, which said union is called the Wallingford Union, and was formed by the direction and under the order of the Poor Law Commissioners for England and Wales, on the

(a) See *ante*, p. 224, note (a).

2d of June, 1835, in compliance with the provisions of the said act, and that the appellants are the guardians thereof, elected pursuant to the said statute. That the property in respect of which they are sought to be rated consists of the union workhouse of the said union with its appurtenances, together with two acres of ground used as a garden to the said workhouse, and adjoining the same, but not being a distinct property. That previous to the formation of the said union the respondent parish, together with the parishes of St. Peter and St. Leonard, in the borough, were jointly possessed of a certain workhouse for the reception of paupers of the said three united parishes, on the site of which the said union workhouse has been erected, in manner hereinafter mentioned. That after the formation of the Wallingford Union the old union of the united parishes was declared void by the Poor Law Commissioners, and the old workhouse belonging to the three united parishes was, with the concurrence of the Poor Law Commissioners, and in pursuance of the said act of parliament and a certain other act passed in the 5th and 6th years of the reign of his said Majesty, and intituled "An Act to facilitate the Conveyance of Workhouses and other Property of Parishes, and of Incorporations or Unions of Parishes in England and Wales," sold by the Visitor and Guardians of the said three united Parishes, and by like concurrence of the said Commissioners, purchased by and conveyed to the Guardians of the said Wallingford Union. That a certain piece of ground, containing about two acres, adjacent to the said workhouse, was also purchased by the said guardians for the sum of 190*l.* 10*s.*, and conveyed to them by the order and direction of the said Commissioners, and in pursuance of the statutes. That the said union workhouse was erected partly on the ground belonging to the old workhouse, and partly on a portion of the said two acres of ground, by the said guardians, at the cost of 5150*l.*, under the like order and directions, and with the approbation of the said Commissioners. That the old workhouse


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was not rated to the relief of the poor of the respondent parish, but that the said two acres of land were rated to the relief of the poor of the said parish before the formation of the said union, but the produce thereof is applied to the maintenance of the pauper inmates. That the said union workhouse is situate in the respondent parish and was erected in manner abovementioned, and pursuant to the provisions of the abovementioned statute, as applied to the Wallingford Union. That the said union workhouse is applied solely to the reception and maintenance of the poor of the said union, including therein as well poor persons falling sick or otherwise becoming destitute in the said union although not settled therein, as the settled inhabitants of the said union. That in addition to the apartments occupied by poor persons received into the union, and appropriated solely to their use, the building also contains certain apartments occupied by the master and matron, but that such apartments are necessary for the purposes of the said union to carry on the work of the said union, and to superintend the paupers belonging thereto. That the said union workhouse also contains a board-room, where the guardians meet once in every week in order to transact the business of the union, and which board-room is used solely for that purpose. That the union workhouse contains a mill affixed to the freehold, whereat the pauper inmates are employed to grind flour for hire, but that only four men work at the said mill at the same time; and also, that all money so earned is solely applied in discharge of the ordinary expenses of the workhouse and the maintenance of the paupers therein. That a piece of garden ground is attached to the said union workhouse, and cultivated by the paupers who are inmates of the house, but that the produce of the said piece of garden ground is consumed by the pauper inmates of the said union workhouse. That the names of the occupiers of the said union workhouse are subscribed in the said rate in these words, viz. "Boards of Guardians of Wallingford Union." That the name of

owner is described in the said rate in these words, viz. "Parishes comprising the Union." That the premises intended to be rated are described in the said rate in these words, viz. "Union Workhouse, Board Room, Officers' Apartments, Yard, Garden, and Premises."

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The question for the opinion of the Court is, whether the said union workhouse and premises, or any of them, were, under the circumstances, liable to be rated to the relief of the poor in the respondent parish or not. If they or any of them were so liable, then the rate must be affirmed, if not then the same ought to be quashed.

Talfourd Serjt., Carrington, Bros, and M. Smith in support of the order of sessions (a). The union workhouse has been properly rated. The 43 *Eliz.* c. 2, s. 5, makes provision for the building of poor houses, but is silent as to their rateability. But the 22 *Geo. 3*, c. 83, s. 19, (*Gilbert's Act*), which first incorporated guardians of the poor, enacted that the buildings and lands taken for the purposes of a union, should be free from all parochial and parliamentary taxes, except such taxes and to such an amount as they were assessed at the time when they were first taken and applied for the purposes of that act. It may be said that the guardians are not rateable, because they have no beneficial occupation, but that is immaterial. *The Governor of the Poor of Bristol v. Wait* (b) is a direct authority on the present question. It was there held that the guardians of the poor, hiring a house, without their district, for the use of the poor, were rateable to the parish in which the house stood, as occupiers, whether the occupation was profitable or not. The only difference is, that here the house is within the district, namely, in one of the twenty-eight parishes within the union, but as to 27-28ths the cases are precisely the same, and the difference pointed out would only affect the amount of the rate, which is not

(a) May 29, before Lord Denman C. J., *Littledale, Patteson & Williams Js.*

(b) 5 A. & E. 1; S.C. 6 N. & M. 383.

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in question here. And, in point of fact, to twenty-seven parishes the occupation is beneficial, even in the popular sense of the term, to the precise extent in which it would, if not rateable, be injurious to the remaining parish. For, if it be not rateable, a portion of land which would have contributed to the funds for supporting the poor of that parish, if it had been occupied by a private individual, will, in consequence of its occupation by the guardians, be totally unproductive to the funds of that parish, while in the other parishes no portions of land will be withdrawn from liability to contribute to their respective funds. This is most important to the several parishes of the union, as by the 5 & 6 Will. 4, c. 76, s. 26, each parish is separately chargeable with its own poor, notwithstanding the union. The case may be illustrated by supposing that a parish contained two farms only, and that one of them, having been taken for a union workhouse, is no longer to be rateable. What would be the consequence? The other farm would have to pay the whole rate. Even if the building in this case be exempt, the two acres of garden ground are liable; for they were liable before their occupation by the appellants, and the Poor Law Act does not authorize the taking of land for a garden. The guardians cannot be said to occupy for any public purpose; they occupy for the purposes of a particular district exclusively.

Sir J. Campbell A. G., W. J. Alexander, and Tyrwhill contra. There will be no hardship on the respondent parish if the workhouse be not rated, for it is built on the site of the former workhouse, and was therefore not rated previously. But the question is simply one of law, whether the guardians are "occupiers" within the meaning of the statute of *Elizabeth*, for it will be conceded that they are not "inhabitants," the only other class mentioned in the statute. It seems admitted also that, if they are "occupiers" for any public purpose, they are not "occupiers" within the meaning of the statute. How then can

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their occupation be said not to be for a public purpose, when it is an occupation in fulfilment of a legal obligation, and in obedience to an act of parliament. Unless the Court is prepared to overturn the case of *Rex v. Weaver Trustees* (a), which has been so lately acted on in *Rex v. Liverpool* (b), their occupation must be held to be for a public purpose. In *The Governor of the Poor of Bristol v. Wait* (c), the Court would not disturb the authority of any former cases, and there are obvious distinctions between that case and the present. There the guardians were not bound to have any workhouse at all; they might have maintained their poor out of doors; still less were they bound to have a workhouse in a foreign parish; and in the judgment of the Court importance is attached to this last circumstance. "But moreover," it is there said, "the question here does not arise upon a rate imposed by the managers of the poor of Bristol upon premises occupied by their own poor, within their own city." (d) This case is not distinguishable from *Rex v. Salter's Load Sluice* (e), and *Rex v. Liverpool* (f). In *Rex v. Beverley Gas Works* (g), the commissioners were held not rateable as occupiers of gas works; but that case is not relied on, because it was decided chiefly on the ground that it would have been nugatory to rate the commissioners to the relief of the poor, as they would have been empowered to recoup themselves by rating the town for the support of the gas work. But the last case of *Rex v. Liverpool* (b), in which it was decided that, under 5 & 6 Will. 4, c. 76, s. 92, borough property is not rateable, on the ground that it is applicable to public purposes, is an unanswerable authority for the appellants.

(a) 7 B. & C. 70, n.; S. C. 9 D. & R. 788.

(b) 1 Perr. & Da. 334.

(c) 5 A. & E. 1; 6 N. & M. 383.


(d) W. J. Alexander mentioned to the Court that a private act of parliament had been overlooked in the judgment in that case; and

that application had been made on that ground to re-open the question, but that it had afterwards been settled.

(e) 4 T. R. 730.

(f) 7 B. & C. 61; S. C. 9 D. & R. 780.

(g) 1 N. & P. 646.

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They did not dispose of funds discretionally and spontaneously, as in *Rex v. Agar*(a) and *Rex v. St. Giles's, York*(b), but under the directions of an act of parliament. *Gilbert's* act, it is said, recognizes the rateability of union workhouses, but this workhouse is built and occupied, not under that act, but the 4 & 5 *Will. 4*, c. 76, which has no such provision,

Cur. adv. vult.

Lord DENMAN C. J. delivered the judgment of the Court :—

The question is, whether a workhouse, situate in one of many parishes which have been formed into a union is rateable, in the hands of the guardians, towards the relief of the poor of the parish in which it is. To shew that it is not so rateable the class of cases was referred to in which the Court has held property exempt from rating by reason of its being wholly unproductive to the occupiers, commencing with the *Salter's Load Sluice* case (c), and ending with the late decision in favour of the corporation of Liverpool. The great leading principle of these cases I take to be this--that when that person who must be deemed the actual occupier is merely a trustee for others, and is prevented by the law from deriving any benefit whatever from the occupation, that person cannot be considered as the occupier for the purpose of being rated: the act of *Elizabeth* plainly supposing both control over the property and the power of enjoying it. Thus in the *Salter's Load Sluice* case (c), where tolls were to be applied for the several purposes of the act, and for no other whatever, Lord Kenyon said, "here is property which is the subject of the rate, but no occupier of it." The *Liverpool* case (d) may be considered as the same with that just cited, which it expressly follows, and the *Weaver Navigation* case (e), in the same volume,

(a) 14 East, 256.

(b) 3 B. & Ad. 573.

(c) 4 T. R. 730.

(d) 7 B. & C. 61; S. C. 9 D. & R. 780.

(e) 7 B. & C. 70, n.; S. C. 9 D. & R. 788.

agrees with them entirely. *Rex v. Sculcoates* (a) fully acknowledges the principle, on which also we lately decided *Reg. v. Beverly Gas Works* (b), and the very important case of *Reg. v. The Corporation of Liverpool* (c). Under the circumstances which appeared on all these occasions, there is no impropriety in saying that the public was the occupier, made such by act of parliament, and receiving by the same authority all the profits of the property, while those who would otherwise have been the occupiers are in the situation of public servants, receivers, and managers for the public benefit, without any interest of their own. So it was argued here—the workhouse is hired by the guardians under authority of the late statute for the public purpose of maintaining the poor, and with no private advantage to the occupiers. But though the maintenance of the poor be a public purpose, the maintenance of the poor of this particular district is a burden on that district alone. The occupation is not beneficial to the guardians individually, but the most advantageous mode of relieving their poor is an advantage to that body. We decided accordingly in *The Governors of the Poor of Bristol v. Wait* (d), which can only be distinguished from the case before us by the local situation of this property, which is within one of the parishes composing the union. But one parish is not more a separate body from another than the parish of St. Mary the More in Wallingford is from the union which annexes it to twenty-eight other parishes. It is not necessary to make any observation on the intermediate cases of property voluntarily appropriated to religious and charitable purposes. We decide on the ground that this property, not being devoted to a public purpose, and being beneficially occupied, is subject to the poor rate.

Order of sessions confirmed.

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UNION.

(a) 12 East, 40.

(b) 1 N. & P. 646.

(c) 1 PERR. & DN. 334.

(d) 5 A & E. 1; S. C. 6 N. & M. 383.

1899.

Wednesday,
April 17th.

HORNER v. KEPPEL.

To a declaration in assumpsit, by the indorsee of a bill of exchange against the acceptor, the defendant, who was not under terms to plead issuably, pleaded that he had not notice of the indorsement to the plaintiff; that he did not, at the time of indorsement, promise to pay the bill, and that the plaintiff did not at such time pay the full amount to his indorser. The Court refused a rule to sign judgment for want of plea.

ASSUMPSIT on a bill of exchange, drawn by *non*, for 9l. 10s., payable two months after date, accepted by defendant, and indorsed by *Shannon Arnold*, who then indorsed it to one *Burton*, who indorsed it to the plaintiff; of all which defendant had due notice, and then promised to pay the plaintiff the amount &c.

Plea; that the defendant did not, at any time before the bill became due, have notice that the bill had been indorsed to the plaintiff, nor did the defendant, at the time of the said indorsement to the plaintiff, promise him to pay the bill according to the tenor and effect thereof, and the plaintiff did not, at the time of the said indorsement, pay the whole amount of the bill to *Burton* as consideration thereof. Verification.

To this plea there was a special demurrer.

Theobald now moved for a rule to shew cause why judgment should not be signed for want of a plea. In the case of *Cowper v. Jones* (a) it was laid down that the Court should not allow judgment to be signed for want of a plea, unless the defendant be under such terms. But in *Walls* (b), in which case several authorities were shewn that the Court, under the circumstances, had jurisdiction, the Court allowed judgment to be signed, on the ground that the plea was calculated to perplex and delay, and it necessary for the plaintiff to consult counsel.

LORD DENMAN C.J.—We ought not to renounce our jurisdiction in these cases, nor ought we to exercise it on frivolous grounds. A plea may be false and frivolous

(a) 4 Dowl. P. C. 591.

Exch. 170; S. C. 1 Do

(b) Law Jour. vol. ii. N. S. 648.

but, in order to interfere, we should have continually to institute a trial of facts on affidavit. In point of law a plea may be so absurd, that we should certainly interfere and punish the party in fault; but we will not interfere in this case.

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LITLEDALE J.—If a plea were quite out of rule, as non-assumpsit to a declaration of debt, we should allow judgment to be signed.

PATTESON J.—If *Cowper v. Jones* (a) is rightly reported, I repudiated the jurisdiction of the Courts over these cases: if I did, I was wrong.

COLERIDGE J.—As a general rule, the Court will not try the truth of a plea on affidavit, nor decide its validity in point of law on motion, unless in very strong cases. But I regret very much that any gentleman in a liberal profession should have countenanced such a plea as the present.

Rule refused.

(a) 4 Dowl. P. C. 591.

KNOWLES v. BURWARD.

Wednesday,
April 17th.

HUMFREY, on this day, obtained a rule to shew cause why the plea in this case should not be set aside with costs, and the plaintiff be at liberty to sign judgment.

The declaration was in assumpsit by the indorsee of a bill of exchange, drawn upon and accepted by the defendant. The defendant pleaded that the drawer did not, at the time of making the said bill of exchange, or of the defendant's acceptance thereof, pay the amount of it to the holder, and the Court made absolute, with costs, a rule for signing judgment as for want of a plea.

In an action by indorsee of a bill of exchange against the acceptor, a plea that the drawer did not pay its amount to the acceptor as the consideration of the acceptance, was

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defendant, as and for the consideration of the defendant's said acceptance, &c.

Edwards, on a subsequent day in this term (8th May) shewed cause, and referred to *Miley v. Walls* (a) and *Cowper v. Jones* (b).

Humfrey, contra. In *Miley v. Walls* (a) it was stated that when the plaintiff took the bill he knew the facts; and in *Horner v. Keppel* (c) the plea traversed a fact in the declaration.

LORD DENMAN C. J.—In *Horner v. Keppel* (c) the plea traversed matter of fact alleged in the declaration, in the form prescribed by the new rules (d). This plea is mere trifling, and waste paper. We by no means abandon our summary jurisdiction over pleas of this kind, but think it better, at the same time, that parties should exercise their own discretion as to signing judgment, rather than call upon us to interfere.

LITTTEDALE J. concurred.

PATTESON J.—In *Cowper v. Jones* (a) I was certainly wrong, if I went as far as I am represented to have gone in repudiating the jurisdiction of the Courts.

COLERIDGE J. concurred.

Rule absolute.

(a) 1 Dowl. P. C. 648.

(b) 4 Dowl. P. C. 591.

(c) *Ante*, 234.

(d) H. T. 4 Will. 4, l. 3.

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BLACKBURN v. EDWARDS and another.

Tuesday,
May 7th.

R. V. RICHARDS moved to set aside the judgment which had been signed in this case for want of a plea. The defendants were under terms of pleading issuably.

The action was debt on a common money bond. The defendant *Edwards* pleaded that the plaintiff ought not further to maintain her action, because before and at the time of the commencement of this suit, and at the time of the making of the promise and agreement herein-after mentioned, to wit, on &c., the defendants exercised and carried on in copartnership together the business of attornies and solicitors at Leamington, in the county of Warwick, for a certain term then unexpired: and there-upon, after the commencement of this suit, on the day and year last aforesaid, in consideration that *Edwards*, at the request of the plaintiff and the other defendant, would dissolve and put an end to the said copartnership, the plaintiff then undertook, and agreed and promised, to forbear all further proceedings in the said action. Averment, that *Edwards*, confiding in the said undertaking, agreement and promise, did afterwards, to wit, on &c., dissolve and put an end to the said copartnership, and the same was accordingly then put an end to by and between the defendants. Verification.

Whately shewed cause in the first instance. The plea is clearly frivolous: the parol agreement is no answer to the specialty declared upon: *Littler v. Holland (a)*, *Brown v. Goodman*, in a note to that case; and 2 Wms. Saund. 47 s. n. 1. Even in an action for a simple contract debt, a covenant not to sue for a *limited time* is not pleadable

(a) 3 T. R. 590.

setting aside judgment which had been signed for want of a plea.

To debt on bond, one of the defendants, who were under terms of pleading issuably, pleaded, against the further maintenance of the action, that at the commencement thereof he and the other defendant were in partnership in business for a term unexpired, and that in consideration that he, at the request of the plaintiff and the other defendant, would put an end to the partnership, the plaintiff promised to forbear further proceedings on the bond. Averment of performance by the defendant. Held, that the plea was frivolous and not issuable; and the Court discharged with costs a rule, against which cause was shewn in the first instance, for

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in bar: *Thimbleby v. Barron* (a). Any issue which could be taken in this plea would be immaterial. The plea, therefore, is not an issuable plea. He cited also *Staples v. Holdsworth* (b),

R. V. Richards, in reply. The plea does not attempt to vary the bond: the bond is forfeited; and the answer offered is merely against the further maintenance of the action. [*Littledale J.* One meaning of an issuable plea is such a plea as will not be open to general demurrer.]

LORD DENMAN C. J.—The plea, whether issuable or not in any sense, is clearly frivolous.

LITTLEDALE J.—No material issue could be taken on this plea. If issue had been taken, there must have been a replader.

PATTESON J.—An issuable plea must be such that issue can be taken on a material fact. This plea is bad in every respect.

Whateley applied to have the rule discharged with costs.

R. V. Richards. Costs are never granted where cause is shewn in the first instance.

Per CURIAM—

Rule discharged with costs (c).

(a) 3 M. & W. 210.

(b) 4 Bing. N. C. 144.

(c) *Coleridge J.* was in the Bail Court.



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Wednesday,
April 18th.

BARSHAM v. BULLOCK, Esq.

DEBT for penalties incurred by the defendant, as sheriff of Essex, under 32 Geo. 2, c. 28. The third count stated that under a writ of *capias ad respondendum*, directed to the defendant, as such sheriff, he had arrested the plaintiff, and caused him to be conveyed to a public drinking house without his consent.

Plea to the third count: that defendant did not without the consent of the plaintiff cause him to be conveyed to a public drinking house, *modo et formâ*, and issue thereon.

At the trial before Lord Denman C. J. at the London sittings after last Hilary term, it appeared that the plaintiff had been arrested and conveyed to a public drinking house without his consent by one of the defendant's officers. The defendant's counsel objected that the defendant could not be made responsible for the act done, unless the party committing the act were shewn to be his agent, for which purpose the warrant should have been produced. His lordship overruled the objection, and the jury found for the plaintiff.

Sir J. Campbell A. G. now moved to enter a verdict for the plaintiff, or for a new trial, on the ground taken at the trial, and cited *George v. Perring* (a).

Cur. adv. vult.

Lord DENMAN C. J. on a subsequent day in this term delivered the judgment of the Court (b).

The question in this case, upon which we took time to consider, is whether the defendant, the sheriff of Essex, was sufficiently connected by the evidence with the person who did the act complained of, without production of the

In debt for a penalty against the sheriff for taking the plaintiff, who had been arrested by the defendant, to a public drinking house without the plaintiff's consent; the plea traversed the taking the plaintiff to the drinking house without his consent. Evidence was given at the trial that the same officer of the defendant who arrested the plaintiff also took him to the drinking house against his consent:—Held, that, as the plea admitted the officer who arrested was the defendant's agent, and the evidence shewed that the same officer took the plaintiff to the drinking house, it was not necessary to produce the warrant to make the defendant liable.

(a) 4 Esp. 63.

(b) Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

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warrant. The third count of the declaration, on which the question arises, charges the defendant with having taken the plaintiff, whom he had arrested for debt, to a drinking house without his free consent. The plea states that the defendant did not take him to the drinking house with his free and voluntary consent, in manner and form.

Now assuming for the sake of argument that this plea traverses as well the fact of taking to the drinking house the defendant, as that it was done without the consent of the plaintiff, still it plainly admits that the defendant arrested the plaintiff; it adopts the act of the officer in arresting him, and it was not necessary to produce the warrant in order to shew that arrest to be the act of the defendant; the plea admits the officer who arrested to be agent of the defendant for that purpose.

Then the evidence shewed who that officer was, that the same officer took the plaintiff to the drinking house; and, it being admitted that he was the agent of the defendant for the purpose of arresting, it follows that he must be his agent in all that he does arising out of that arrest. In *George v. Perring(a)*, which was referred to, the person who did the act complained of was not the officer who arrested, and it was shewn that the warrant was neither addressed to nor handed over to him. We think that the defendant was sufficiently connected with the act done and that no rule should be granted.

Rule refused.

(a) 4 Esp. 63.

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The QUEEN *v.* The LONDON and SOUTHAMPTON Railway Company.

Tuesday,
April 16th.

CHANNELL, in Michaelmas term, 1837, obtained a rule nisi for a mandamus, commanding the defendants to issue their warrant to the sheriff of Surrey to summon a jury, who should assess the sum to be paid to Messrs. Francis, for their interest in certain premises about to be taken by the Company, under the 4 & 5 Will. 4, c. lxxviii. (local and personal).

The affidavits on which the rule was obtained stated that Messrs. F., for many years past, had carried on business on the premises, of which they had a tenancy from year to year, commencing at Christmas: that their landlord never removed any tenant who paid his rent regularly, and that in consequence they, having always so paid their rent, were induced to lay out large sums on the premises.

The following portions of the Company's act were then set out, namely, the 47th section, by which it is enacted "that all tenants at will, lessees for a year, tenants from year to year, and other persons in possession of any lands which shall be intended to be taken or used for the purposes of this act, and who shall have no greater interest in the lands than as tenants at will, or lessees for a year, or as tenants from year to year, shall respectively deliver up the possession of such lands to the said Company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after notice to that effect shall have been given by the said Company to such respective tenants, or lessees or persons in possession, or left upon the said lands, (whether such notice be given with reference to the time of the com-

A railway company's act required tenants from year to year, (among others) to deliver up possession of their lands, if required by the Company, six months after notice, whether such notice was given with reference to the time of the commencement of the tenancy, or not, the Company compensating the tenant for his unexpired term or interest. A tenant from year to year, under a Christmas holding, who, on a reasonable expectation that his landlord would not put an end to the tenancy, had made improvements on his land, received, in January, notice to quit in six months, and at the

Michaelmas following possession was demanded by the Company. The Company then finding that it was not a Michaelmas holding told the tenant he might retain possession till Christmas. The tenant remained in possession until after that period:—Held, that as he held over after notice, his situation was the same as if a regular landlord's notice had been given, and that he was not entitled to compensation.

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mencement of such tenant's holding or not, and whether such notice be given before or after the said lands shall be purchased by the said Company), or at such time after the expiration of six calendar months from the giving or leaving of such notice as they shall be respectively required; and in case any such tenant or lessee, or person so in possession as aforesaid, shall refuse to deliver up such possession as aforesaid, it shall be lawful for the said Company, either under their common seal, or under the hands and seals of two, at least, of the directors of the said Company, to issue their precept to the sheriff of the county in which the lands shall be situate, to deliver possession thereof to such person or persons as shall in such precept be nominated to receive the same; and the said sheriff is hereby required to deliver possession of the said lands accordingly, and to levy and satisfy such costs as shall accrue by or on account of the issuing and execution of such precept on the person so refusing to deliver possession, by distress and sale of his goods and chattels." The 48th section enacted, "that where any such tenant or lessee shall be required to deliver up the possession of any lands, so occupied by him, before the expiration of his term or interest therein, the said Company shall and they are hereby required to make or tender to such tenant or lessee, before they shall issue their precept to the sheriff to give possession of the lands in the occupation of such tenant or lessee, satisfaction or compensation for the value of his unexpired term or interest in the said premises; which satisfaction or compensation, in case of difference, shall be ascertained and determined in the same manner as any other satisfaction or compensation for any lands to be taken or used under the authority of this act is by this act directed to be made or determined."

The affidavits then stated that, on the 10th January, 1837, the Messrs. *Francis* were served with a notice, requiring them, within six months after the service, to deliver up the premises to the Company; that after the expiration of

the six months the Company's secretary demanded possession, and told them that they were trespassers; that they were willing to give up possession on receiving compensation, but that the Company had refused the same.

The affidavits in opposition to the rule stated that the Company had purchased the premises in August, 1837; that possession had certainly been demanded of the Messrs. Francis at Michaelmas 1837, on the supposition that they held under a Michaelmas tenancy, but that, on discovering it to be a Christmas tenancy, the Company had informed Messrs. Francis that they might retain possession till Christmas, and that they did so retain it beyond that period.

Sir J. Campbell A.G. and M. D. Hill now shewed cause. In answer to this rule it may be sufficient to refer to *Rex v. Liverpool and Manchester Railway Company* (a). The 56 and 57 sections of that act, there relied upon by the applicant for compensation, contained the very same terms as the sections relied upon by the present applicant, and were held, notwithstanding, to be inadequate to comprise such an interest as the reasonable expectation of the renewal of a lease, although the lessee had expended large sums upon the demised premises. In *Ex parte Farlow* (b) and the other cases, where compensation was directed to be made by the *Hungerford Market Company*, the Court had to give effect to a much more comprehensive act, which awarded compensation for "good-will" and "improvements." The tenant in this case had possession of the premises when this rule was moved for, and retained his possession until the regular expiration of his interest; and it does not appear that he was at all injured by the notice to quit, or in any way constrained by it in his mode of carrying on his business.

Jervis and Channell, contra. Compensation is not claimed for the hope of renewal, but because the tenant is

(a) 4 A. & E. 650; S. C. 6 N. & M. 186. (b) 2 B. & Ad. 341.

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to be dispossessed, although his tenancy has not been determined; for the Company are not put in the situation of landlords by the act, so as to be able to determine the tenancy, and the landlord himself could not have given notice to quit at the time required by the Company. It is true that the Company did not act upon the notice given, but the Messrs. *Francis* could not anticipate that the notice would not be acted upon; so that after July they must have suffered from the precarious nature of their possession. When the Company first gave notice to quit, on the erroneous supposition, as it is said, that it was a Michaelmas holding, a statutable contract was made, from which they had no right to withdraw; *Ex parte Davies* (a); and the contract gives the applicants a title to compensation.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in this term (May 1), delivered the judgment of the Court.—This is a rule for a mandamus on the part of Messrs. *Francis*, to obtain compensation under the 47th and 48th sections of 5 W.M. 4, c. lxxxviii. establishing the Southampton Railway Company. The language of those sections is substantially the same as that of the act establishing the Liverpool and Manchester Railway Company (b), and the case of *Ex parte Davies* v. *Liverpool and Manchester Railway Company* (c) is a strong authority upon the subject. In that case the claimants held under a lease for seven years, having a reasonable expectation of renewal, but no covenant or agreement to that effect. The Company gave a six months' notice under the act, which expired at the same time as the term of seven years; and it was held that the claimants had no right to any compensation. Here the claimants were tenants from year to year, commencing at Christmas. The Company, in January, 1837, gave a six months' notice under the

(a) 4 B. & Ad. 327; S. C. 1 N. personal).
& M. 112. (c) 4 A. & E. 650; S. C.
(b) 7 Geo. 4, c. xlix. (local and & M. 186.

supposing erroneously that the claimants held from Michaelmas. On discovering the error they gave notice that the premises would not be wanted till Christmas. The claimants did not quit in July, nor indeed at Christmas. At the time of the notice in January the Company had not purchased the landlord's interest, but they did so before they gave notice that the premises were not wanted till Christmas. Now if the claimants had quitted in July they would undoubtedly have been entitled to *some* compensation, but as they have chosen to hold over beyond Christmas, at which time they might have been compelled to quit by the ordinary landlord's notice without compensation, it was said that they are not entitled to any thing. On the other hand it is contended, that the tenancy has never been determined, because no regular landlord's notice was given; that the situation of the tenants was materially altered by the six months' notice given in January, and their possession rendered wholly uncertain from day to day, after the expiration of those six months.

We cannot think that the act of parliament requires two notices in the case of a tenancy from year to year; but the true construction is, that the Company might either give the ordinary landlord's notice, ending with the current year of the tenancy, in which case no compensation would be due, or six months' notice under the act to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compensation the premises must be given up. If, as in this case, the Company inform the tenant that he may hold them till the end of the current year, and he chooses so to do, the situation of the parties is the same as if a regular landlord's notice had been originally given, and the tenant is entitled to no compensation, because he has voluntarily retained the possession. It makes no difference that the Company were not landlords

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when they gave the notice in January; that notice undoubtedly meant to operate under the act, and would have been done so but for the subsequent conduct of the defendant. Under these circumstances we are of opinion that the rule must be discharged.

Rule discharged.

Thursday,
April 18th.

TOMES v. HAWKES.

If a cause is referred at the assizes, and a verdict taken for the plaintiff, with power to the arbitrator to certify for which party the verdict is to be entered, he may certify after the assizes are over, although no order of nisi prius be obtained.

HUMFREY on this day moved for a rule nisi to set aside the certificate of an arbitrator given in this case. It appeared by the affidavit that the cause had been for trial at the last Northampton assizes, when a verdict was taken for the plaintiff by consent of the parties. The matter referred to an arbitrator, who was to certify for which party the verdict was to be entered, but that no order of nisi prius had been made. The arbitrator proceeded to hear the evidence on the same day, and after the assizes were over gave his certificate, that "a verdict ought to be entered for the defendant," and a verdict was entered accordingly.

Humfrey now contended that, in all cases where a certificate is given to an arbitrator to make a certificate, the certificate should be exercised whilst the jury was sitting, and not at any other events during the assizes, where the jury are supposed to be. This was a mere parol submission, and no order was given to the arbitrator to enter a verdict. The object of giving a certificate amounts to a mere delegation of the functions of a jury as to hearing the evidence. The hearing should be made during the same assizes, in order that a verdict may be pronounced as if it were by them.

Lord DENMAN C.J.—I think, on your own construction, your argument falls to the ground, for, if the giving of a certificate during the same assizes is sufficient, it

that the absence of the jury is immaterial, for no one ever heard of the same jury being called upon to give any sanction to the certificate. That being so, it is unnecessary that the certificate should be given during the assizes, for the solid foundation of the force of a certificate is in the consent of the parties.

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LITTLEDALE and WILLIAMS Js. concurred.

COLERIDGE J.—This is in fact an attempt to set aside the award,

Rule refused.

DRY (surviving partner of one MIRFIN, deceased,)
v. DAVY.

Friday,
April 19th.

ASSUMPSIT on a guarantee. At the trial in Middlesex at the sittings after last term before Lord Denman C. J. it appeared that the plaintiff and his late partner, in his lifetime, had carried on business in Tottenham Court Road as linen-draper, and that the defendant's son being about to set up in business, she gave them the following guarantee.

Where the defendant gave the following guarantee: "Messrs. M. & D., my son, G. D., is desirous of commencing business in your way, and wants the usual credit for four or six months. If you think well to supply him I will be answerable for the amount of 100l."—Held, that this was not a guarantee binding on the defendant after a change in the firm of M. & D.

"Messrs. Mirfin & Dry,
Gentlemen.

"My son, Mr. G. C. Davy, of No. 14, Old Church Street, is desirous of commencing business in your way, and wants the usual credit for four or six months. If you think well to supply him, I will be answerable for the amount of one hundred pounds. I am, Gentlemen,
Yours, &c.

Mary Davy."

"Clapham, 28 June, 1836.

The house of *Mirfin & Dry* supplied goods on this guarantee, to the defendant's son from August, 1836, to April, 1837, and he paid from time to time money on account, exceeding the guarantee, and the present action was brought to recover the balance. It also appeared that,

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at the time the guarantee was given, and whilst a portion of the goods was supplied, a Mr. *Nicol* was a partner with *Mirfin & Dry*, and that in December, 1836, the partnership, so far as related to him, was dissolved. For the defendant it was contended that this was not a continuing guarantee, and that it was put an end to by the change of firm, and *Nicholson v. Payne* (a) was cited. His lordship was of this opinion, and nonsuited the plaintiff.

Sir *J. Campbell* A. G. now moved for a rule nisi to set aside the nonsuit. This was a continuing guarantee; it was given to the firm of *Mirfin & Dry*, whomsoever that firm might consist of, and therefore it was not extinguished by the retirement of *Nicol*. In *Pease v. Hirst* (b), the defendant *Hirst*, and other defendants, had given a joint and several promissory note to a banking-house for 300*l.*, upon which interest was paid for several years by *Hirst*; two of the banking firm retired, and new partners came in, but it was held that the note was a continuing security, and that it might be sued upon by the original payees for a balance due to the new firm. *Bayley* J. observed, "a surety bond or other instrument may be so framed as to comprehend future as well as present partners." So in this case the guarantee is drawn so as to include any change of the firm.

LORD DENMAN C. J.—I think *Pease v. Hirst* (b) is a strong authority against this motion, for the reason laid down by *Bayley* J. viz. "that by the form of the instrument (in that case) none of the parties had placed themselves in the condition of sureties. They appear on the face of the instrument to be principals." In the present case the defendant is a surety only, and there can be no doubt that a change of firm operates to put an end to the liability of a surety, unless the change is expressly provided for.

(a) 1 C. & M. 48.

(b) 10 B. & C. 122; S. C. 5 Man. & R. 88.

LITTLEDALE and PATTESON Js. concurred.

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COLERIDGE J.—The retirement of *Nicol* either puts an end to the guarantee or he should have joined in the action.

Rule refused.

WENTWORTH and another v. COCK, administrator, &c.

ASSUMPSIT. The declaration set out an agreement of the 31st October, 1836, between the plaintiffs and the intestate, whereby it was agreed that the plaintiffs should supply to the intestate from 50 to 100 tons of slate blocks monthly, two feet six inches long, two feet wide, four inches thick, eight blocks averaging one ton, delivered on a wharf or lighter in London at 47s. per ton, and that the plaintiffs should also supply the intestate immediately from 100 to 130 blocks of the same superficial dimensions, three inches thick, averaging about ten and a-quarter blocks per ton, at 47s. per ton, and any further quantity monthly, that the intestate might require, and the intestate agreed to receive any quantity of the blocks before-mentioned, being three or four inches thick, sawn at each side and at each end, not exceeding 200 tons per month, &c., and the plaintiffs were not to supply any other person with blocks of the same description, except they were to be used in the plaintiffs' neighbourhood. The agreement to be in force till the 1st January, 1838, unless cancelled by mutual consent. Terms of payment to be bill at four months, or five per cent. discount for ready money. Averment, that the plaintiffs had been always ready to supply the intestate during his life, and the defendant, as administrator &c., and that they did after the intestate's death, tender to the defendant 400 tons of slate block answering to the description, and at the price agreed upon, but that the defendant would not accept them or any part of them, or pay for them.

Friday,
April 26th.

A contract to supply *A.* from 50 to 100 tons of blocks of slate, of certain dimensions, monthly, and also from 100 to 130 tons of blocks of other dimensions, monthly, and any further quantity that he might require, not exceeding 200 tons per month, the contract to be in force to a certain time, unless previously cancelled by mutual consent, is a contract binding on his administrator.

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Third plea: the death of the intestate, after making the agreement and before breach.

Special demurrer, on the ground that the intestate's death was no revocation of the agreement, and afforded no answer to the action.

Warren, in support of the demurrer, cited *Marshall v. Broadhurst* (a), *Com. Dig.* (Administrator) B. 14; *Sanders v. Esterby* (b), *Berisford v. Woodroff* (c), *Siboni v. Kirkman* (d), *Quick v. Ludborrow* (e), *Hyde v. Skinner* (f), *Hyde v. Dean of Windsor* (g), and *Toller's Executors*, 463. (He was then stopped.)

Godson contra contended, that the personal judgment of the intestate, as to the quantity of slate to be taken, and his personal exertions were necessary to effectuate the contract, and cited *Williams' Executors*, 1226-7-8, *Corner v. Shew* (h), *Birch v. The Earl of Liverpool* (i), *Robson v. Drummond* (k).

LORD DENMAN C. J.—There is really nothing in this case to discuss. The intestate had nothing to do but to receive all the blocks which the plaintiffs might send within certain limits, and have more if he wanted them.

LITTLEDALE and PATTESON Js. concurred.

COLERIDGE J.—I am of the same opinion. The case might have been different, if the contract had been merely to supply as many blocks as might be required.

Judgment for plaintiffs.

(a) 1 Tyr. 348; S. C. 1 C. & J. 403.
(b) Cro. Jac. 417.
(c) Cro. Jac. 404.
(d) 1 M. & W. 418; S. C. (in error), 3 M. & W. 46.
(e) 3 Bulst. 29.

(f) 2 P. Wms. 197.
(g) Cro. Eliz. 552.
(h) 3 M. & W. 350.
(i) 9 B. & C. 392; S. C. Mann. & R. 380.
(k) 2 B. & Ad. 303.

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Tuesday,
April 30th.

WILSON v. RAY.

ASSUMPSIT for money had and received, and on an account stated. Plea: non assumpsit. At the trial, before Lord *Denman* C. J. at Guildhall at the sittings after Easter term 1837, it appeared, that the action was brought to recover the sum of 29*l.* 16*s.* under the following circumstances. In March 1833, the plaintiff being embarrassed, compounded with his creditors, by paying them 8*s.* in the pound; the defendant, who was a creditor to the amount of 49*l.* 13*s.*, would not sign the deed of composition unless he was paid the whole of his claim. The plaintiff thereupon gave him a bill of exchange at nine months for 29*l.* 16*s.*, dated April 3, 1833, and he signed the deed of composition on the 6th May following, when he received a promissory note for 19*l.* 17*s.* being the amount of his dividend at 8*s.* in the pound. The plaintiff, having subsequently paid the amount of the bill and of the note, now sought to recover the amount of the former, as for money paid on an illegal consideration; his lordship thought him entitled to recover, but gave the defendant leave to move to enter a nonsuit.

When a creditor refused to sign a composition deed without a bill of exchange for the remainder of his debt, which the debtor gave him, and the former then signed the deed; the debtor having subsequently paid the amount of the bill to his creditor:—
Held, that it was a voluntary payment, and could not be recovered back as money had and received,

Kelly having obtained a rule accordingly in the ensuing Trinity term;

Platt and *Richards* shewed cause on a former day in this term (a). The only ground on which the defendant can contend that he is entitled to retain this money, is, that it was a voluntary payment; but in all the cases which have been decided on that principle there has been an absence of fraud. An agreement like the present has been always held to be fraudulent, from *Cockshott v. Bennett* (b) downwards, and therefore the security given was void, and the money never ceased to be the money of the plaintiff's.

(a) April 30, before Lord *Denman* C. J., *Littledale*, *Patteson* and *Coleridge* Js.

(b) 2 T. R. 763.

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Besides, the payment was not voluntary, the bill of exchange was extorted, and the payment of it made under pressure. But, conceding that the payment may have been made voluntarily, still, as it was obtained by a fraud, the defendant is not entitled to retain it. *Duke de Cadaval v. Collins* (a). There, the defendant had arrested the plaintiff for 10,000*l.*, and the plaintiff in order to obtain his liberty paid 500*l.*; the plaintiff afterwards sued the defendant for money had and received, and the Court held that, as the defendant had *fraudulently* arrested the plaintiff, the latter was entitled to recover the 500*l.* back. [Lord Denman C. J.—*Smith v. Cuff* (b) is something like this case, but there the creditor, who had taken the promissory note for the remainder of his debt, had negotiated it to a bona fide holder, who recovered upon it. But suppose in this case the plaintiff, instead of giving a bill, had made a promise to pay, and, after the deed of composition had been signed, had chosen to keep his promise and pay the money; could he recover it back?] If there were no fraud he could not. But it is not sufficient to say that the plaintiff need not have paid the amount of the bill of exchange. The *Duke de Cadaval* need not have paid the 500*l.*, and might have resisted the pretended claim altogether, but, as it was obtained from him through a fraud, it was held to be recoverable. So in this case the other creditors were defrauded by the agreement, and therefore no change of property in the money was effected. This case, however, is completely governed by *Turner v. Hoole* (c), where a creditor had signed a composition deed in favour of his debtor, but afterwards induced the latter to give him bills for the full amount of his debt, dated the day before the composition deed, and after receiving one instalment sued the debtor upon the bills, and recovered the amount; and it was held that the debtor might recover the money so paid, in an action for

(a) 4 A. & E. 858; S. C. 6 N. & M. 324.

(b) 6 Mau. & S. 160.

(c) Dowl. & R. N. P. C. 27. These reports are commonly bound up with 2 D. & R.

money had and received. That case was lately acted upon in the Common Pleas in the case of *Alsager v. Spalding* (a). The Court has always been studious to prevent one greedy creditor from getting more than the others in a composition of this kind, *Coleman v. Waller* (b), and it will not interpret a payment of money, under circumstances like the present, to be a voluntary payment, *Hills v. Street* (c).

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Kelly contra. It is fully conceded that, if this money had been obtained by fraud or duress, it would be recoverable back, and it is admitted that the defendant would not have been enabled to maintain an action on the bill of exchange. But that is the ground of the defence to the action now, that the plaintiff being under no compulsion, legal or moral, to pay the money, chose to pay it. The payment therefore was voluntary. The only authority that impugns this view is *Turner v. Hoole* (d), but that case must be misreported, or it is not law. [Lord Denman C.J. I own I feel no difficulty, except for that case; we had better therefore look at it, before we hear you further.]

Cur. adv. vult.

LORD DENMAN C. J., on a subsequent day in this term (May 1), after stating the case of *Turner v. Hoole* (d), said,—This rule must be made absolute. That case is undoubtedly in point against the defendant, but the defence here relied upon was not presented to Lord Tenterden. He considered that case, as I on the trial considered the present case, to be decided by the principle laid down in *Cockshott v. Bennett* (e), which has never been impeached; but he was not reminded of another principle, of at least equal importance, which was established in *Mariott v. Hampton* (f), that what a party recovers from

(a) 4 Bing. N. C. 407.

(b) 3 Y. & J. 212.

(c) 5 Bing. 37.

(d) Dowl. & Ry. N. P. C. 27.

See note (c), *ante*, 254.

(e) 2 T. R. 763.

(f) 7 T. R. 269.

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another by legal process, without fraud, shall never be recovered back by virtue of any facts which could have availed in the former proceeding. If this were otherwise, the right of parties could never be settled by the most solemn proceedings, as they would be liable to be reversed by evidence, which, if produced at the proper season, might have received a complete answer. The *Duke de Cadaval* case (a) turned on fraud and extortion, practised by an abuse of ex parte legal process, and money was paid, which the party extorting it knew he had no right to. Whose money then was it? It was still the *Duke de Cadaval* who paid to extricate himself from imprisonment. In this case, can we say that the money was had and received to the plaintiff's use, when it was voluntarily paid under circumstances which would have afforded a valid answer to a claim for its recovery? The payment was in the nature of an estoppel. It is immaterial that in this case there had been no action on the bill; the principle is the same; the plaintiff has, with a full knowledge of all the circumstances, made a payment which he might have resisted on the same ground on which he now seeks to recover.

Rule absolute.

(a) 4 A. & E. 858; S.C. 6 N. & M. 324.

Thursday,
May 2d.

DAVIES v. WILKINSON.


The following instrument was held to be an agreement, and not a promissory note.

ASSUMPSIT. The first count stated that, before &c. the plaintiff came to an account with the defendant, and on that account the defendant was found indebted to the plaintiff in the sum of 695*l.*, and in consideration thereof

"I agree to pay the plaintiff or order, the sum of 695*l.* at four instalments. viz. the first on &c., being 200*l.*; the second, on &c. being 150*l.*; the third, on &c., being 150*l.*; the fourth, on &c., being 100*l.*; the remainder 95*l.* to go as a set-off for an order of R. to J. and the remainder of his debt from C. D. to him."

Where the declaration stated, that the plaintiff accounted with the defendant, and on the account was found indebted in £—, and in consideration thereof promised to pay by instalments according to the above agreement, and the plaintiff at the trial proved that he had lent money to the defendant:—Held, that the above instrument was evidence of the accounting.

the defendant promised to pay to the plaintiff (according to the terms of the special agreement hereinafter set out). The second count was on an account stated in the usual form.

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Pleas: 1, non assumpsit; 2, that the accounts and promises in the declaration were come to and made for and in respect of monies lost by betting at horse-races, and that each bet exceeded the sum of 10*l.* &c.

At the trial before *Littledale J.* in Michaelmas term, 1837, the counsel for the plaintiff stated that he would prove the money sued for was actually lent to the defendant to pay his losses at the Derby at Epsom in 1833; and he called a witness named *Wettenhall*, who stated that he remembered being on one occasion at *Tattersall's* when he saw the plaintiff hand the defendant a 500*l.* note, for which the defendant expressed his gratitude. The plaintiff then put in the following instrument, stamped with an agreement stamp:—

"I agree to pay to Mr. *Charles Davies*, or his order, the sum of 695*l.* by instalments; viz. the first instalment to be paid on Monday next, June 10, 1833, being 200*l.*; the second on the settling day at Doncaster after the St. Leger, being 150*l.*; the third on the settling day at Doncaster after Epsom, 1834, being 150*l.*; and the fourth on the settling day at Doncaster after the St. Leger, 1834, being 100*l.*; the remainder, 95*l.*, to go as a set-off for an order of Mr. *Reynolds* to Mr. *Thompson*, and the remainder of his debt owing from *C. Davies* to him.

" (Signed) *James Wilkinson.*

"Windsor, June 7, 1833."

The defendant objected that this instrument was a promissory note, and should be stamped accordingly, and he cited *Green v. Davies* (a). The learned judge thought it was properly stamped as an agreement, and referred to *Leeds v. Lancashire* (b), but reserved the point. The defendant then called witnesses to prove that the money owing to the plaintiff was for bets lost at horse-races, but the jury found a verdict for the plaintiff, damages 400*l.*

(a) 4 B. & C. 235; S. C. 6 D. & R. 306.

(b) 2 Camp. 205.

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Platt, in the same term, obtained a rule nisi to enjoin nonsuit, on the grounds, first, that the instrument was a promissory note; secondly, that if it was an agreement it was a *nudum pactum*, as there was no consideration for it; thirdly, that there was a variance between the evidence and the consideration stated in the first count.

Thesiger and *Humfrey* now shewed cause. In *Greaves v. Davies* (a), where the instrument contained an unconditional promise to pay, without any thing engrafted upon it, it was properly held to be a promissory note; but in *L v. Lancashire* (b), where the instrument, after commencing as a promissory note in the usual form, contained an endorsement that the sum mentioned in the note should be called for for six months, it was held that, between original parties, it was an agreement only, and not a promissory note. So in *Bolton v. Dugdale* (c), where the instrument was "Received and borrowed of A. B. 30*l.*, which I promise to pay with interest at the rate of 5*l.* per cent. I also promise to pay the demands of the sick club at H. in part with interest;" it was held to be an agreement. These cases dispose of the objection, for they shew that the condition as to the application of the 95*l.* by way of set-off may be incorporated in the agreement. With regard to the agreement being *nudum pactum*, it is not to be distinguished from an I O U, in which no consideration is ever stated, and as to the variance which is alleged, it is quite immaterial, for there is a count on an account stated, and as there was evidence of there having been money lent, this agreement was evidence of the accounting.

Platt and *Ball*, contra. It is submitted that the instrument is a promissory note. It is an order for the payment of a sum of money at stated periods completely within the word

(a) 4 B. & C. 235; S. C. 6 D. & R. 306.

(b) 2 Camp. 205.

(c) 4 B. & Ad. 619; S. C. & M. 412.

the Stamp Act(a). *Leeds v. Lancashire* (b) was a case where the negotiability of the instrument was destroyed by the indorsement; and both in that case and *Bolton v. Dugdale* (c) it was not certain what sum of money was payable under the order. [Patteson J. According to the report of *Bolton v. Dugdale*, in 1 Nev. & Man. 412, that certainly seems to have been the ground on which the judgment of the Court proceeded (d).] It was uncertain how much money was payable to the sick club in that case, but under the present instrument no more than 600*l.* could ever become payable. *Haussoullier v. Hartsinck* (e), and *Dixon v. Nuttall* (f), are both cases in which the instrument contained a term *ultra* the promise to pay a sum of money, and yet they were held to be promissory notes. Secondly, if the instrument amounted to an agreement, it was void for want of a consideration being expressed. The declaration alleges that the plaintiff and defendant accounted, and, in consideration thereof, the defendant promised according to the terms in the agreement, but no accounting whatever was proved. From all the cases since *Wain v. Warlters* (g), it is clear that an agreement must contain the consideration, as well as the promise. [Patteson J. Why would not parol evidence of the consideration do? This is not a case within the Statute of Frauds.] No parol evidence was given. The only evidence given was of money lent, but the declaration contained no count for money lent. It is laid down in *Com. Dig. Agreement* (B 2.) that "when an agreement is in writing, the consideration is not inquirable;" but that means when the agreement is by deed. Evidence, therefore, should have been supplied of an accounting between the parties. An I O U first of all was only held to be evidence on a count

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(a) 55 Geo. 3, c. 184. Schedule.

(b) 2 Camp. 205.

(c) 4 B. & Ad. 619; S. C. 1 N. & M. 412.

(d) And see *Jones v. Simpson*, 2 B. & C. 318; S. C. 3 D. & R. 545;and *Hutchinson v. Heyworth*, 1 Perr. & Da. 266.

(e) 7 T. R. 733.

(f) 6 C. & P. 320.

(g) 5 East, 10.

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for money lent, *Childers v. Boulnois* (a), it was afterwards held evidence on an account stated, *Payne v. Jenkins* (b), but an I O U admits a debt due on the face of it, and therefore it differs from a promissory note.

LORD DENMAN C. J.—This instrument certainly is a promissory note up to a certain point, but then the remainder contains an agreement as to 95/., which is to be paid in a particular manner, and takes it, I think, out of the class of promissory notes, and constitutes it a special agreement between the parties; the instrument therefore was properly received. But, secondly, it is said that, if it is an agreement, it contains no consideration distinct from the promise. It seems to me, however, that the words “I agree to pay,” import a consideration, and that the words are equivalent to an acknowledgement of owing the amount. Evidence was given to shew that there was money lent, and the paper was only put in to prove that there was such a transaction between the parties, and I think as it was signed by the party charged, it was undoubtedly evidence on this point.

LITTLEDALE J.—I think the objection, that this instrument is a promissory note, cannot be sustained. It falls within the principle of the cases cited, though the terms of the instrument are somewhat different. A promissory note ought to be certain and precise, without any ambiguity in its terms, or as to the amount payable, but if this instrument is a promissory note, the condition as to the 95/., falls to the ground, which could not have been the intention of the parties. Secondly, it is objected that the agreement does not contain any consideration on the face of it, and it certainly does not; but the declaration states, that the parties came to an account, and on the account the defendant was found indebted to the plaintiff &c., and in

(a) 1 Dowl. & Ry. N. P. C. 8.

(b) 4 C. & P. 324.

consideration thereof made the promise, and it seems to me that the paper itself is evidence of the consideration, not indeed on the ordinary count for an account stated, but according to the old form.

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PATTESON J.—Neither *Leeds v. Lancashire* (a), nor *Bolton v. Dugdale* (b), are entirely in point with the present case. In *Leeds v. Lancashire* (a), the indorsement limited the negotiability of the instrument, which is an objection not applying to the present instrument, and in *Bolton v. Dugdale* (b), the judgment of the Court proceeded principally on the ground of the sum to be secured by the note being uncertain. Nor is it necessary to decide whether an instrument might not be framed to operate as a promissory note and also as an agreement. In this instrument is an agreement to pay 695*l.*, and yet it is clearly not a promise to pay all that sum in money, or to one payee, and therefore I think it has not the characteristics of a promissory note, but is a mere agreement between the parties.

COLERIDGE J.—The point, as to this instrument being a promissory note or not, is important, for there is no case which applies to it exactly. In laying down a rule, as to the stamp which a given instrument requires, we ought to be careful to make it depend on the essential characteristics of the instrument; for, although there may be a case as my learned brother has observed, in which an instrument may operate both as a note and as an agreement, it would be inconvenient to make two stamps necessary; the stamp therefore should be selected according to the governing character of the document. On looking to this instrument there can be no doubt it is an agreement, not indeed containing a consideration, as it need not, for it is not within the Statute of Frauds, and the consideration

(a) 2 Camp. 205.

(b) 4 B. & Ad. 619; S. C. 1 N. & M. 412.

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may be supplied by parol evidence. The prope
therefore was affixed.

Rule refused.

(a) The rule was made absolute for a new trial on the evi

Tuesday,
April 30th.

FAULKNER v. CHEVELL.

Where the town clerks of a borough always exercised the office of clerk of the peace by themselves or deputy, without any formal appointment thereto:—
Held, that the deputy town clerk was not liable to penalties under the 22 Geo. 2, c. 46, for practising as an attorney at the borough sessions, without proof of his having acted as deputy clerk of the peace.

DEBT for penalties. The first count of the declaration stated that *Charles P. Harris*, before &c., was clerk of the peace for the town of Cambridge, and the defendant was the deputy of the said *Harris*, so being and clerk of the peace as aforesaid, and that the defendant being such deputy as aforesaid, after the 29th September 1749, and within the space of twelve months next the commencement of the suit, to wit, on the 30th September 1834, at the general quarter sessions of the peace holden at the Guildhall of the said town, in and about the said town, being the town where the defendant exercised his office of such deputy as aforesaid, before *T. Harris* and others, justices &c., did act, and presume to act as attorney for one *James Davey*, &c., contrary to the provisions of the statute, &c. There were other counts for acting as attorney at subsequent sessions. Plea, not guilty.

At the trial before *Park J.* at the Cambridge assizes, 1837, it appeared that the action was brought to recover penalties, on the 22 Geo. 2, c. 46, s. 14(a),

(a) That sect. enacts, "And to the end that justice may be impartially administered in the several general or quarter sessions of this kingdom, be it further enacted by the authority aforesaid, that no clerk of the peace, or his deputy, nor any under-sheriff or his deputy, shall from and after the said 29th day of September (viz. 1749) act

as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace to be held for such county, borough, division, city, town corporate, or other place within this kingdom, where he shall execute the duties of clerk of the peace, or deputy clerk of the peace, under-sheriff, or deputy, on any pretence

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ing as an attorney at the borough sessions of Cambridge; the defendant being (as was alleged) deputy clerk of the peace. The plaintiff's counsel contended that it was sufficient for him, under the plea of not guilty, to prove merely specific acts by the defendant, as an attorney, at the quarter sessions, without proving him to be a deputy clerk of the peace. The learned judge thought that the plea of not guilty threw the whole burden of proof upon the plaintiff, but his lordship reserved the point. The plaintiff then opened the following case against the defendant, viz. that the office of clerk of the peace of the borough of Cambridge had always been incident to the office of town clerk, and the duties of it performed by the town clerk, or his deputy, without any appointment whatever. In the 7 Geo. 4, a local act was passed for building a gaol in Cambridge, which directed the site to be conveyed to the clerk of the peace, and the land was accordingly conveyed to the then town clerk. In June, 1830, Mr. *Harris* was appointed, under the corporation seal, to the office of town clerk of the borough of Cambridge, and enjoyed the said office, by himself or his sufficient deputy, during good behaviour. Immediately on Mr. *Harris's* appointment he appointed the defendant his deputy, who also received the appointment of deputy town clerk from the corporation. After the first election of councillors under the municipal reform act, the town council of Cambridge removed *Harris* from his office of "town clerk," and appointed Mr. *Gunning* in his stead. Immediately upon this *Harris* handed over to *Gunning* the draft indictments he had prepared for the then ensuing borough sessions, with a blank in them for the name of the clerk of the peace, which *Gunning* filled up with his own. *Gunning* had no specific ap-

ever; but if any clerk of the peace or his deputy, or any under-sheriff or his deputy, shall presume to act as a solicitor, attorney, or agent aforesaid, such clerk of the

peace or his deputy, under-sheriff or his deputy respectively, shall be subject and liable to a like penalty of 50*l.*, to be recovered in manner aforesaid."

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pointment to the office of clerk of the peace, but acted in and exercised that office by virtue of his appointment as town clerk. It was also opened that, by arrangement between Mr. *Harris*, while town clerk, and the defendant, the former conducted the business at sessions as clerk of the peace, and the defendant the general business of town clerk. Proofs were then given of the defendant having acted as an attorney for various parties at the sessions. The learned judge was of opinion that the plaintiff was bound to make out that the defendant was deputy clerk of the peace, and that he had acted as such, and that proof of his being deputy town clerk did not shew him to be deputy clerk of the peace. The defendant then proved that he had never acted at any one sessions as a deputy clerk of the peace, and he also proved an appointment, by the Duke of *Rutland*, as *custos rotulorum* of the borough of Cambridge, of Mr. *Harris* to the office of clerk of the peace, dated 19th May, 1830; the office, however, was at that time full, *White*, the then town clerk, not having been removed until the 31st of the same month. The learned judge then asked the jury whether the defendant had ever acted as deputy clerk of the peace, and on their replying in the negative, he nonsuited the plaintiff, giving him leave to move to enter a verdict.

Kelly, in Easter term, 1837, obtained a rule nisi accordingly, on the ground, first, that under the plea of not guilty, the fact of the being and having acted as a deputy clerk of the peace was admitted on the record, but on argument of the rule this day, he abandoned the point, on the authority of *Earl Spencer v. Swannell*(a), and *Jones v. Williams*(b): secondly, that on the evidence the defendant was shewn to be the deputy clerk of the peace, and that being clothed with the legal right to execute the office, he brought himself within the penalties of the statute, although

(a) 3 M. & W. 154.

(b) 4 M. & W. 375.

his principal had discharged the duties of clerk of the peace.

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B. Andrews, and *Byles*, now shewed cause. The 22 Geo. 3, c. 46, being a penal act, it is necessary to prove the defendant to be strictly within the enactment, in order to enable the plaintiff to recover the penalties. It was necessary therefore to prove that the defendant was deputy clerk of the peace, and also that he executed the office. The plaintiff proved neither. It would appear that there was some dispute in Cambridge as to the right of appointment to the office of clerk of the peace, but it is quite clear that in May, 1830, the Duke of Rutland, as *custos rotulorum*, appointed *Harris* clerk of the peace; and that he acted under that appointment, and that he has acted ever since as clerk of the peace. A month after that appointment he was appointed town clerk by the corporation, and appointed the defendant as his deputy, but only to the office of town clerk. The two offices are quite distinct, and are held by different tenures, for by 1 W. & M. c. 21, s. 6, clerks of the peace are removable at will, whereas the town clerk holds during good behaviour.

But, even if the defendant were a deputy clerk of the peace, it would be necessary to prove that he had executed the office, as that is another ingredient of the offence as contained in the statute. This the plaintiff completely failed in proving.

Kelly and *Gunning*, contra. The defendant is clearly within the purview of the statute which was passed "to the end that justice might be impartially administered at quarter sessions," for if a town clerk and his deputy may arrange, the latter to transact the business of town clerk, and the former that of clerk of the peace, with impunity, it is clear that the grossest partiality may be displayed by the clerk of the peace at sessions on behalf of his deputy. But the defendant is also within the words of the statute.

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No mere arrangement of the kind suggested can have the effect of averting legal consequences from certain definite acts. Suppose two partners in trade agree, one to take upon himself one portion of the business, and the other a different portion, would that prevent their being partners in the whole? With regard to proof of an appointment of the defendant as deputy clerk of the peace, suppose an act had imposed penalties for acting as deputy clerk of the peace, and an action had been brought against the defendant for penalties for acting without being duly qualified, would it not have been sufficient to shew that the town clerk and his deputy had always acted as clerk of the peace without any specific appointment? As far back as the corporation documents extended there never had been an appointment to the clerkship of the peace (except the solitary one by the Duke of Rutland in 1830) and therefore unless the office be incident to that of town clerk, there never has been a good clerk of the peace at Cambridge. But the appointment by the Duke of Rutland was utterly void, it was unsupported by any evidence of the right to appoint, and the *custos rotulorum* of a borough has no right to appoint a clerk of the peace(a). In *Hughes v. Strachan*(b) the only proof of the town clerk of Liverpool being also clerk of the peace was his acting in the office, as in the present case. And the circumstance of Harris, the defendant's principal, giving up the office of clerk of the peace upon his removal from that of town clerk, and handing over the draft indictments to his superior is a complete proof of the union of the two offices. There was no necessity, therefore, to prove an express appointment. As it appears that the appointment to the office of town clerk carried with it, as incident thereto, the clerkship of the peace, the appointment of the defendant as deputy town clerk included all the duties incident to the office. For it is essential to the office of a deputy to have all the func—

(a) See 37 Hen. 8, c. 1; 1 W. & M. c. 21, s. 6.

(b) 4 B. & C. 187; S. C. 6 D. & R. 219.

tions of the principal, and a covenant to limit the powers of the deputy is void; *Parker v. Kett* (a), *Godolphin v. Tudor* (b), Com. Dig. Officer (D. 3.) As the defendant therefore was entitled to act as clerk of the peace when his principal was not present, the mere fact of his not having personally acted in the office cannot relieve him from the penalties. This appears from *Stanley v. Dodd* (c). There, in an action against the defendant for supplying goods for the maintenance of the poor, whilst he was a guardian of the parish, it was held not to be necessary to prove that he had acted as guardian of the poor. It is true that on a new trial of that case (d), the defendant was not held liable to the penalty, but that was on the ground of the act of parliament, by virtue of which he became guardian of the poor, having been repealed, therefore the decision in the first case is unimpeached.

Lord DENMAN C. J.—I think the course taken by the learned judge at the trial was perfectly correct, and that the nonsuit must stand. The declaration charges the defendant with being deputy clerk of the peace for the town of Cambridge, and that, so being such deputy as aforesaid, at the Cambridge quarter sessions, in and for the said town (being the town where he executed the office of such deputy,) he presumed to act as an attorney. Now supposing the declaration to be properly framed in thus stating that the defendant executed the office of deputy clerk of the peace in the town of Cambridge, the evidence has completely failed to shew that he did so execute it. This is fatal, for, as the 22 Geo. 2, c. 46, mentions both the clerk of the peace and his deputy, a personal acting by the latter in the office is required to bring him within the provisions of the statute. It is true that the act may be in some measure defeated by an arrangement such as was

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(a) 1 Salk. 95; S.C. 1 Ld. Raym.
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(b) 3 Salk. 251.

(c) 1 D. & R. 397.

(d) 2 D. & R. 809.

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alluded to in the argument, but we cannot add a new term to the statute.

At the same time I cannot assent to some of the arguments urged for the defendant, as I do not think it necessary that an actual appointment as deputy clerk of the peace should be shewn, for if he had been proved to have acted in the office that might have been sufficient. On the other hand, the production of an appointment to the office would not be sufficient to shew that the penalties had been incurred unless there had also been an acting. The case of *Stanley v. Dodd* (a) is quite inapplicable, because, by the provisions in the act there proceeded upon (b), no guardian of the poor is to provide &c. for the poor, if therefore the defendant in that case was a guardian of the poor, his having acted or not in the office would not make any difference.

LITTLEDALE J.—The defendant cannot be considered to have filled the office of deputy clerk of the peace. He certainly never acted in it, and he was never so appointed, but was only appointed deputy town clerk.

PATTESON J.—I am not at all satisfied that the defendant ever did fill the office of deputy clerk of the peace. But, even supposing Mr. *Kelly's* argument valid, that the clerkship of the peace is incident to the office of town clerk, as they are certainly distinct offices, it would by no means follow that an appointment as deputy town clerk would also enure to create him deputy clerk of the peace. And the fact of his never having acted in the latter capacity would shew that it never was intended to create him deputy clerk of the peace. On turning to 55 *Geo. 3*, c. 137, s. 6, on which *Stanley v. Dodd* (a) was decided, it appears the words there imposing a penalty on a guardian supplying the poor, extend to the time during which he shall *hold* the office. But in the present case the penalty

(a) 1 Dow. & R. 397.

(b) 55 *Geo. 3*, c. 137, s. 6.

is for acting as attorney where the party *executes* the office of deputy clerk of the peace; he must have acted in the office, therefore, before he can be made liable.

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COLERIDGE J.—It was contended in argument that an acting by the principal is sufficient to make the deputy liable. But this is a very novel construction of a penal act. If indeed there were two partners in a business, the acting by one might perhaps make the other liable, or the acting of the deputy might make the principal liable, though neither of these cases is free from doubt, but to contend that the act of the principal makes the deputy liable to penalties is quite untenable.

Rule discharged.

BRUNSKILL v. ROBERTSON, Esq. (a)

CASE. The declaration stated that whereas one *Frederick Studdy*, who, before and at the time of making the arrest thereafter mentioned, was known as well by the name of *William Studdy* as by the name of *Frederick Studdy*, whereof the defendant then had due notice, and which said *Frederick Studdy* had, before the accruing of the debt to the plaintiff thereafter mentioned, oftentimes admitted to the plaintiff that he was known by the said name of *William Studdy*, whereof the defendant had also due notice at the time of the said arrest, had become in-

A declaration alleged that *Frederick S.*, who before his arrest was known as well by the name of *William* as of *Frederick*, whereof the defendant had notice, and who before the accruing of the debt, oftentimes admitted to the plaintiff that he was known by the

(a) Decided February 4th at the vacation sittings after last Hilary term.

name of *William*, was arrested by the defendant, as sheriff, under a writ issued at the plaintiff's suit, and describing *S.* as *William S.*, and that the defendant took an insufficient bail-bond, and released him, whereby &c. The plea traversed that the defendant had notice that *S.* was as well known by the name of *William* as of *Frederick*, and alleged new matter with a verification. On demurrer to a subsequent part of the pleadings, held that, as the plea denied that the defendant had notice as above, it was an answer to the cause of action in the declaration, for that the allegation as to *S.*'s admissions to the plaintiff was mere evidence, and that, as the sheriff would have been justified in letting the prisoner go at any time, he had not by taking a bail-bond rendered himself liable on the ground that he had exercised his election to treat the arrest as valid.

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debted to the plaintiff in a large sum of money, exceeding 20*l.*, to wit &c., upon and in respect of certain causes of action before then accrued to the plaintiff against the said *Frederick Studdy*, and the said *Frederick Studdy* being so indebted, the plaintiff, for the recovery of his said debt afterwards, to wit, on &c. sued out a *capias* against the said *Frederick Studdy* by the name of *William Studdy*, directed to the sheriff of Devon, by which said writ our lord the king commanded the said sheriff that he should omit no &c., but that he should enter and take *William Studdy* (meaning the said *Frederick Studdy*, who was then, as aforesaid, known as well by the name of *William* as *Frederick*, if he should be found in his bailiwick, and him safely keep until he should have given him bail or made deposit with him according to law, in an action on promises, at the suit of the plaintiff, or until the said *William Studdy* should by other lawful means be discharged from his custody; and our said lord the king did thereby further command the said sheriff that on the execution thereof he should deliver a copy thereof to the said *William Studdy* (so named in the said writ), and our said lord the king thereby require the said *William Studdy* (so named in the said writ) to take notice that within eight days after the execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in the said action and that in default of his doing so such proceedings might be had as were mentioned in the warning, &c. The declaration then set out the further commands on the writ, that the sheriff should return it, &c.; and then stated that it came to the hands of the defendant as such sheriff to execute, indorsed for bail, &c. Averment, that the defendant executed the writ, and arrested *Frederick Studdy*, &c., and took a bail-bond from him and one *A. Studdy*, being, as the defendant well knew, a minor,—the same bond being void in law; yet defendant, not regarding his duty, &c. treated the same as a valid bond, and thereupon, without the plaintiff's consent, permitted *Frederick Studdy* to escape

out of his custody, the debt for which he was arrested being unpaid. Averment, that *Frederick Studdy* did not make deposit or put in special bail, or otherwise obey the writ; that the defendant afterwards falsely returned that the said *William Studdy* (the said *Frederick Studdy* being, as the defendant well knew, then known as well by the name of *William* as by that of *Frederick*) was not found in the bailiwick of the defendant, by means of which premises the plaintiff is injured, &c.

Plea: that at the time of the said arrest in the declaration mentioned the said *Frederick Studdy* was not known, nor had he, the defendant, notice that the said *Frederick Studdy* was known as well by the name of *William Studdy* as by the name of *Frederick Studdy*, and he, the defendant, by virtue of the said writ, took and arrested the said *Frederick Studdy*, as in the declaration mentioned, on the false information of the plaintiff by his agent in that behalf that the said *Frederick Studdy* was *William Studdy*, as described in the said writ; and the defendant in fact says that the said *Frederick Studdy*, being so taken and arrested, did not nor would admit himself to be *William Studdy*, as in the declaration mentioned, but refused so to do, and executed the said bail-bond in the declaration mentioned in his true name of *Frederick Studdy*. Verification.

Replication, that after the making of the arrest as in the declaration mentioned, and before the taking of the said bail-bond for the due appearance of the said *Frederick Studdy* to the said writ, so issued at the suit of the plaintiff as aforesaid, according to the exigency of the said writ, and whilst the said *Frederick Studdy* remained in the custody of the defendant by virtue of the arrest, the defendant appealed to *Frederick Studdy*, and demanded whether he the said *Frederick Studdy* was not the person indebted to the plaintiff in the sum of money in respect of which the said writ in the declaration mentioned was issued, and also the person meant by the plaintiff under the name of *William Studdy*, in the said writ mentioned, and that the said

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Frederick Studdy thereupon, before the taking of the said bail-bond, assented thereto, and admitted to the defendant that he was such person, and then promised and sworn the defendant that he would discharge the debt and the costs incurred by the said arrest before the time for putting in special bail to the said writ should arrive, and save harmless the defendant, so being such sheriff as aforesaid, from the consequences of his taking such bail-bond as is in the said declaration mentioned, and of his discharging him, the said *Frederick Studdy*, out of his said custody; and then upon the defendant, so being such sheriff as aforesaid, to the said bail-bond accordingly, and discharged *Frederick Studdy* out of his custody, relying upon such promise. Verification, &c.

Rejoinder: that *Frederick Studdy*, after the arrest, did not admit that he was *William Studdy*, as described in the writ in the declaration mentioned, but, on the contrary thereof, *Frederick Studdy*, as soon as he knew that the person against whom the writ was sued was in the writ described by the name of *William Studdy*, to wit, on the 24th and from thence continually whilst he was under arrest, affirmed, as the fact was, that he was named *Frederick Studdy*, and never had been called or known by the name of *William Studdy*; and then denied the validity of the arrest, and, as in the plea alleged, executed the said bail-bond in his true name of *Frederick Studdy*. Verification.

Surrejoinder: that *Frederick Studdy* did, from the time of the arrest continually until the time of his discharge out of custody, admit that he was such person as in the plaintiff's replication is mentioned, in manner and form as the plaintiff hath therein alleged. Conclusion to the country.

Special demurrer, on the ground that the surrejoinder does not take issue on any fact or allegation contained in the rejoinder, and that if the said surrejoinder contains an answer to the said rejoinder, by way of confession and avoidance, it ought to have concluded with a verification and not to the country, &c.

W. H. Watson, in support of the demurrer. The declaration itself is either bad, or contains no cause of action that is answered. It states that *Studdy* was known by the one name as well as the other. This is denied by the plea; the rest of the plaintiff's pleadings merely shew that *Studdy* was the party intended to be arrested; so that the sheriff would have been a trespasser if he had detained him. *Studdy* himself, if he passed by a false name, might be stopped from denying it to be his real name; but the sheriff was not bound to detain him. In *Cole v. Hindson* (a), which was an action of trespass against an officer for taking the goods of *A. B.*, the plea that they were taken under a distringas against *C. D.* (meaning the said *A. B.*), to compel an appearance, and that *A. B.* and *C. D.* were the same person, was held not to be supportable; and Lord *Kenyon* there observed that there was no averment that the plaintiff was known as well by one name as the other. That authority was followed in *Shadgett v. Clipson* (b). The averment is denied in the present case. So in *Scandover v. Warne* (c), which was an action on a bail-bond, the declaration stated that a writ was sued out against *Francis Jones* by the name of *John Jones*; that the sheriff arrested him accordingly, and that thereupon the defendant became bound for the appearance of *Francis*, arrested by the name of *John*. The writ, proved at the trial, commanded the sheriff to take *John Jones*; and Lord *Ellenborough* C.J. said that he could not "hear that instead of *A. B.*, mentioned in a writ, it was meant that the sheriff should arrest *X. Y.*," and referred to the case last cited. And even assuming that, under the circumstances disclosed by the pleadings, the sheriff might have arrested *Studdy* without being a trespasser, he was, at all events, not bound to detain him: *Morgans v. Bridges* (d). There the sheriff, having a writ against *Godfrey Barnett*, arrested *Maurice*

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(a) 6 T R. 234.

(c) 2 Campb. 270.

(b) 8 East, 328.

(d) 1 B. & Ald. 647.

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Barnett, who was the real debtor, and had represented himself as *Godfrey*. The sheriff was informed of these circumstances; yet it was held, in an action for an escape, that he was not *bound* to detain the debtor, though he might have been *justified* in doing so. The new rule (32 of H. T. 2 Will. 4), which says that, where a defendant is described in the process by a wrong name, he shall not be discharged out of custody, or the bail-bond be cancelled, if due diligence has been used to obtain his proper name, is a rule for the regulation of practice between parties to the action, but does not affect the general law, whether as regards the officer executing process, or the person resisting it. This appears from *Finch v. Cocken* (a), which was debt on a bail-bond, and shews that the bond taken in this case was wholly void.

Erle, contra. Whether the sheriff was bound to arrest or not, in the first instance, he was at all events bound to take an effectual bail-bond, after he had made his election, by taking the bail-bond, to affirm the arrest. It appears from *Morgans v. Bridges* (b) that, where there is in the process a misnomer, arising from the misrepresentation of the party arrested, the sheriff has an election whether to detain him or not. Now in this case the sheriff made his election to detain the prisoner, and was therefore bound. The plea denies the allegation that *Studdy* was known as well by one name as another; but, even if that allegation be struck out, there will remain a good cause of action on the declaration, which states that before the accruing of the debt, he oftentimes admitted to the plaintiff that he was known by the name of *William*; and that is not answered by the plea. If the facts are to be taken as they appear at the end either of the plea or the rejoinder, the defendant is estopped. [Little J. If that part of the declaration which says *Studdy* was as well known by one name as the other, be

(a) 2 C. M. & R. 196.

(b) 1 B. & Ald. 647.

struck out, what remains is mere evidence.] It is treated as an estoppel in *Price v. Harwood* (a). There the party arrested was misdescribed in the process as *John*; but he was held to be estopped by having said that his name was *John*, when interrogated before the process was issued. In *Crawford v. Satchwell* (b) it was determined that, as the defendant had omitted to plead a misnomer, he might be taken in execution by a wrong name. *Studdy*, in this case, has not attempted to take any advantage of the misnomer, and he is estopped from doing so. In *Newton v. Maxwell* (c) it did not appear that the defendant contracted the debt under a wrong name. It may be admitted that the new rule respecting misnomers would not afford a justification in many cases of mere mistake, but here there is a quasi estoppel.

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W. H. Watson replied. [*Littledale J.* Why does the plea not conclude to the country?] It is not demurred to. The plea states that *Studdy*, at the time of arrest, would not admit himself to be *William Studdy*, which is quite enough to exonerate the sheriff.

LORD DENMAN C. J.—The declaration is good to a certain extent. It states that *Studdy* was as well known by the name in the writ as by his real name; that the sheriff arrested him, and took insufficient bail. The plea is equally good to the same extent; it avers that he was not known indifferently by either name; but it is incorrect in adding a number of circumstances which are quite immaterial. Of this, however, the plaintiff has no right to complain, as it is occasioned by the allegations he himself has introduced in his declaration; and the question is, whether the declaration itself is good in that respect. It states that before the debt was contracted *Studdy* oftentimes admitted to the plaintiff that he was as well known by the name of

(a) 3 Campb. 108.

(c) 2 C. & J. 215.

(b) 2 Str. 1218.

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William as by that of *Frederick*. . . It is contended that this amounted to an allegation of a good cause of law, and that the plea is bad, as it does not answer it. That certainly is the case; for the plea merely avers that he would not, at the arrest, admit himself to be *William*; which is consistent with the declaration, since he might make an admission at one time and retract it at another. I think that the declaration is bad; and that we may come to this conclusion without questioning *Morgans v. Bridges*, which appears to be a decision in favour of the defence. In discussing that case, the Court took an alternative, and said that, though the sheriff might be justified, he was not bound to detain, but that he might exercise an option. I do not think they meant to say that he would be liable for any subsequent miscarriage in taking bail, if, in the exercise of his option, he chose to detain the prisoner. . . I must have meant that the sheriff might, if he pleased, take the chance of the information given him being correct, that, if he did, he would be able afterwards to protect himself by shewing that *Maurice*, the party arrested, was known as *Godfrey*. . . It would become matter of evidence rather than of law, and if *Maurice* had contracted the debt in the name of *Godfrey*, no doubt a jury would say that was "as well known" by one name as another. . . "As well known" cannot mean "as often known." If the prisoner assented to and authorized the false name, when the debt was contracted, that would be decisive evidence. But the doctrine, that a sheriff is bound to detain, on receiving information, is a very different thing. He might be justified both in taking the prisoner, and also in letting him go as soon as the mistake in the name was discovered. . . If the declaration is good, the plea is good, and the confession of it with a verification is a ground of special defence only. . . All the subsequent pleadings are immaterial.

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LITLEDALE J.—It would have been sufficient for the plaintiff to have alleged that *Studdy* was as well known by one name as the other. But, if that allegation be struck out, the declaration is bad, for nothing will remain but matter of mere evidence. The circumstance that *Studdy*, before he contracted the debt, often admitted he was known as *William*, is not enough; he might have done so on occasions when it would amount to nothing at all, or admitted it at one time and denied it at another. How then does the plea answer the declaration? It first of all denies that he was as well known by the name of *William*, and ought to have concluded to the country. It then goes on to what is quite immaterial; it denies that he admitted himself to be *William* on the occasion of the arrest,—a fact not asserted in the declaration, and the denial of which is no ground of confession and avoidance. The replication then flies off altogether from both the original allegations, that he was as well known as *William*, and that he oftentimes admitted this before incurring the debt, and taking up the irrelevant matter in the plea introduces a conversation with the sheriff at the time of the arrest. The rejoinder, as far as it goes, maintains the plea. But it is unnecessary to go through the pleadings; the declaration, as to that part which has not been sufficiently answered, is itself bad.

WILLIAMS J.—It is not denied that one allegation in the declaration has been sufficiently answered; but it is contended that the remaining allegation, to which there is no answer, discloses a good cause of action. Is, then, the allegation that *Studdy* oftentimes admitted his name to be *William* enough? Clearly not, for this plain reason; that, as the detention would be a continuance of the trespass, even if it be granted, which is a good deal, that the sheriff ought to have taken the prisoner, it cannot be said that, on better information, he would be bound to detain him.

COLERIDGE J.—The pleadings are very inartificial. The

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argument has been substantially whether there is a good cause of action in the declaration and a good defence to the plea. One cause of action relied on is fully answered so that the plaintiff is driven to contend that he has declared altogether upon two causes of action, and that one of them has not been answered. Now the allegation that *Studdy* oftentimes, before contracting the debt, admitted himself to be *William*, shews no cause of action. The fact, as alleged, might be important as evidence; but it is nothing more, for *Studdy* might have represented himself as *William* on some indifferent occasions, and his real name, notwithstanding, have been well known, both when the debt was contracted and when the writ issued. It appears to me a view of the declaration favourable to the plaintiff. But I do not really think the declaration should be so read, but that the unanswered allegation is to be taken in connection with the one answered; so that the plaintiff will then say in effect,—*Studdy* was as well known by one name as the other, and, in affirmance of this, I say oftentimes admitted as much. I do not agree that the sheriff, having once exercised an option, cannot go back: I think he should as soon as he knows the real name.

Erle applied for leave to amend, which was refused.

Judgment for the defendant.

Saturday,
May 4th.

STRANGE and another v. PRICE.

1. The following is not a sufficient notice of dishonour:—"S. & Co. inform defendant that *A. B.*'s acceptance of 875*l.* is not good. As indorser, the defendant is called upon to pay the money, which will be expected immediately."

ASSUMPSIT by the indorsees of a bill of exchange against the indorser. Pleas: 1. That the bill had not been

2. The words *returned, dishonoured*, and come back with *notarial charges*, applied to a bill of exchange, imply that it has been presented and refused payment, per *Coleridge*.

accepted; 2. That due notice of dishonour had not been given to the defendant.

At the trial at Salisbury, before *Patteson J.*, at the summer assizes, 1837, the following letter was relied upon by the plaintiffs as a notice of dishonour:

“Swindon, December 29, 1836.

“*Messrs. Strange, Strange & Co.* inform Mr. *James Price* that Mr. *John Ballerton's* acceptance, 875*l.*, is not paid. As indorser, Mr. *Price* is called upon to pay the money, which will be expected immediately.”

The defendant contended, on the authority of *Hartley v. Case* (a) and *Solarte v. Palmer* (b), that the notice was insufficient; the learned judge reserved the point, and the verdict passed for the plaintiffs.

Erle having obtained a rule nisi to enter a nonsuit in the ensuing Michaelmas term,

Crowder and *Ball* now shewed cause. Before *Hartley v. Case* (a), the doctrine in which was carried farther in *Solarte v. Palmer* (b), it was always considered that any form of notice of dishonour was sufficient which stated that the bill was not paid, and that the holder was looked to; this was the law as laid down in *Tindal v. Brown* (c), and the alteration of it by the two former cases has not met with the approbation of the profession. The present case however is distinguishable. In *Hartley v. Case* (a), the notice did not state that the bill was accepted, which the present mentions expressly, and *Abbott C. J.* admitted in that case that no precise form of words is necessary in the notice of dishonour. In *Solarte v. Palmer* (b) the notice did not state, either expressly or by implication, that the acceptor had refused payment of the bill, and it was quite consistent with it that the indorser had been applied to in the first instance. That objection cannot be made here. The Courts have refused to carry *Solarte v. Pal-*

(a) 4 B. & C. 339; S. C. 6 D. & R. 505.

(b) 7 Bing. 530; S. C. Dom. Proc. 1 Bing. N. C. 194.

(c) 1 T. R. 167.

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mar. (a) any farther, for in *Grugeon v. Smith* (b) and *Hedger v. Stevenson* (c), it was held that notice stating the bill had been returned was sufficient, and in the latter case the Court of Exchequer expressly overruled a case of *Boulton v. Welsh* (d), in the Common Pleas, in which a contrary decision had been come to. It is true that in *Boulton v. Welsh* (d) the notice did not state that the bill had been returned with charges, as it did in *Grugeon v. Smith* (b), but *Parke B.* in that case expressly disclaimed deciding on that distinction. In *Houlditch v. Gault* (e) a similar question came again before the Court of Common Pleas, and that Court shewed a disposition to review its decision in *Boulton v. Welsh* (d). In all these latter cases the words used are "the bill is returned," but surely the words "the bill is not paid," are equivalent. The word *returned* has no technical meaning. [Littledale J. The word *returned* implies that it has been indorsed over to some person, and has been returned to the holder, but it is not the word technically applicable in the case of dishonour, for suppose the holder presented the bill himself, he would not use the word in giving notice. *Ratteson J.* There is nothing on the face of this notice to shew that the bill was due, and therefore I feel it difficult to distinguish *Solarte v. Palmer* (f).] The defendant is called upon to pay the money, and he could not be liable unless the bill was due. In *Solarte v. Palmer* (a) the notice did not state that the bill had been accepted. [Ratteson J. No need it; the bill must be presented whether it be accepted or not.] The impolicy of laying down a rule, which will require every holder of a dishonoured bill to have an attorney at his elbow, has been frequently reprobated by the Courts. No technical words can or ought to be required. A simple notice to the indorser that the bill has not been

(a) 7 Bing. 530; S. C. Dom. Proc. 1 Bing. N. C. 194.


(b) 6 A. & E. 499; S. C. 2 N. & P. 303.

(c) 2 M. & W. 799.

(d) 3 Bing. N. C. 668.

(e) 4 Bing. N. C. 411.

paid by the acceptor, and that the indorser is looked to for payment, is all that is required in law. No mercantile man, nor indeed any one else, can doubt that such information is conveyed in this notice.

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Erle, contra. This case is not to be distinguished from *Solarte v. Palmer* (a). It is quite consistent with the terms of the notice that the bill was not due, or that the acceptor had not been applied to for payment. Rejecting the ground of decision in *Hartley v. Case* (b), as to the necessity of the notice stating that the bill had been accepted, the other ground of the judgment of the Court must govern this case, viz. "that the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." The cases of *Grurgeon v. Smith* (c) and *Hedger v. Stevenson* (d) are easily distinguishable, for in both of them the notice contains the word *returned*, which is almost a technical word, and the most expressive that could be used, except perhaps *dishonoured*, which was held sufficient in *Woodthorpe v. Jones* (e). This was the ground of the decision in *Hedger v. Stevenson* (d), for there *Parke B.* said, "the word *returned* is almost a technical term in matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid." In *Houlditch v. Cauty* (f) the Court of Common Pleas did not overrule their former decision in *Boulton v. Welsh* (g), but decided the case on the parcel promise to pay.

Lord DENMAN C. J.—Some doubt certainly has been thrown on *Solarte v. Palmer* (a), but, as observed by my brother *Parke*, in *Hedger v. Stevenson* (d), we are bound by it, and I think it governs the present case. The notice

(a) 7 Bing. 530; S. C. Dom. & P. 303.

Proc. 1 Bing. N. C. 194.

(d) 2 M. & W. 799.

(b) 4 B. & C. 339; S. C. 6 D. & R. 505.

(e) 2 M. & W. 109.

(f) 4 Bing. N. C. 411.

(c) 6 A. & E. 499; S. C. 2 N.

(g) 3 Bing. N. C. 688.

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STRANGE
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there, after describing the bill, stated that legal proceedings would be taken for the recovery thereof. It might have been held, no doubt, on such a notice, that the party was fully apprized of the facts of the case, but it is clear that the law now requires express notice of the acceptor having refused payment as well as of the party being called upon to pay.

LITLEDALE J.—In general, no doubt, such a notice would give sufficient information to the parties concerned, but in laying down a general rule we must take care to prevent its being too wide. Now it certainly is consistent with this notice that the bill was not presented at all, or that it might not have been paid through the neglect of the holder.

PATTON J.—I granted leave to move for a nonsuit in this case, as I thought it might by possibility be distinguished from *Solarte v. Palmer* (a), and I was anxious that it should be, but I confess that I cannot distinguish. It is said that the defendant is called upon to pay as indorser of the bill, but so he was in *Solarte v. Palmer* (a) and again it is singular that the date of the bill and of its becoming due is not stated in either case. I do not say that it should be stated, but it ought to appear by necessary inference that the bill was due.

COLERIDGE J.—The word *returned* certainly does imply that the bill had been presented and refused payment. It also does the word *dishonoured*, and so does the notification that the bill has come back with notarial charges.

Rule absolute.

(a) 7 Bing. 530; S. C. Dom. Proc. 1 Bing. N. C. 194.

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DE GONDOVIN by G. HUMBERT, his next Friend, v.
LEWIS and Another.

Saturday,
May 4th.

TRESPASS for seizing and carrying away certain goods of the plaintiff, to wit, three portfolios and 100 drawings, &c. Plea, not guilty. At the trial at the Sussex summer assizes, 1837, before Lord *Denman* C. J., the following appeared to be the facts of the case. The plaintiff, a French youth, arrived at Brighton by the steam-boat one evening in September 1836, and as he was leaving the boat, accompanied by a friend who had gone on board to meet him, the defendants, who were Custom-house officers, seized, with some violence, a portfolio which the plaintiff held under his arm, and which contained some school drawings and a few biscuits. They refused to restore it to him, but gave it back to him next morning. The notice of action given to the defendants was signed by "*A. Pilcher, solicitor*," (who was the attorney conducting the suit,) "acting in the behalf and as the *prochein amy* of the plaintiff," and it was contended for the defendants that as an infant could not appoint an attorney, the notice was bad. His lordship overruled the objection. The defendants then contended, that the plaintiff must be nonsuited, for that *drawings* under the 3 & 4 Will. 4, c. 56, Schedule, were liable to forfeiture, and that the act complained of was a lawful seizure by the defendants. His lordship was of this opinion, and directed a nonsuit, but required the jury to find what damages the plaintiff had sustained, who returned a verdict of one farthing.


Wallinger having obtained a rule in the subsequent Michaelmas term, to set aside the nonsuit.

Sir *J. Campbell* A. G. and *Spankie* Serjt. now showed

(a) The acts relating to the customs, and cited in the present case, are contained in the 3 & 4 Will. 4, cc. 50 to 56.

1. Where a custom-house officer took by force, from under the arm of a passenger landing from a vessel, a portfolio containing school-drawings, without making any previous demand:—Held, that, as drawings, which had not paid duty, were liable to forfeiture, under 3 & 4 W. 4, c. 56, the officer was not liable in trespass *de bonis asportatis*, but, per Lord *Denman*, C. J. he would be liable in an action of trespass to the person, unless some attempt were made to conceal the goods.

2. Where a notice of action was required to be given by "the attorney or agent:"—Held, that a notice signed by "*A. P.*, solicitor, as the *prochein amy* of the plaintiff," an infant, was sufficient.

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 v.
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cause. The preliminary question is, whether a good notice of action was given. The 3 & 4 Will. 4, c. 53, s. 3, directs that notice shall be given by the attorney or agent; it is a question therefore whether the present notice by a party as prochein amy is sufficient. It is said, justice will be defeated if it is not so, because an infant cannot appoint an attorney, but a prochein amy may appoint an attorney, and thus comply with the act. [*Littledale*]. There is nothing in the objection, for the prochein amy stands in the place of the attorney, and an attorney appointed by him would not be the attorney on the record.] The merits there is a substantial answer to the action. By the act for prevention of smuggling, 3 & 4 Will. 4, c. 53, s. 3 & 28, goods liable to duties, and all things made use of for the removal of them, shall be forfeited, if unshipped before the duties are paid or secured; these goods are within the description in the schedule (to c. 56) of goods liable to seizure; for drawings and prints are enumerated. As the plaintiffs had not paid duty for them the defendants were justified in seizing them, for c. 53, s. 32, enacts, that goods liable to seizure under that or any other act relating to the revenue of the customs may be seized by any officer of the customs. It was said at the trial that, as these drawings were brought into this country for sale, they were not seized for sale but that can make no difference.

Wallinger, contra. It has not been shown that the goods mentioned in the declaration were necessarily liable to duty; and even if they were, they could not be taken from the person by force without previous demand. The seizing, taking away, and detaining were clearly proper, and, if defendants cannot justify the whole, they are passers ab initio, as they assume to act under an authority in law. They must show their authority to the Court, and if any doubt arise, the Court will lean in favour of the subject in the construction of revenue acts; because it is the more necessary here that the officers should

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be kept within the clear line of their duty, since such protection is afforded them by these acts, that the subject cannot either oppose at the time, or afterwards obtain remedy by action, without great risk; as, for instance, resisting an officer in due execution of his duty subjects a party to a penalty of 100*l.* (c. 53, s. 56), or imprisonment for three years, or transportation for seven years (sect. 61), and not stopping a cart, when required, to a similar pecuniary penalty (sect. 40); and see also sects. 66, 67, 103, 107, of the same act, 3 & 4 *Will. 4*, c. 53. These goods were "on or about the person," as much as if in the hat or pocket; and as such the case is provided for by sect. 35; and as a person before he is searched may require to be taken before a magistrate, who is to judge of the reasonable ground of suspicion, it would seem clear that the officer must notify his intention, by request, before he actually proceeds to search the person. If forfeited, they should be seized as such, sect. 132 of chap. 52, giving power to seize goods would mean this, for sect. 133 speaks of such goods as "seized as forfeited." [Coleridge J. Does it follow that it must be so stated at the time of seizure?] The intent should appear either by words or conduct—an entry on land to take advantage of a forfeiture should be made, with that express view—and the subsequent conduct here, from which the animus at the time might be inferred, went actually to negative the seizure *quà* forfeiture—the goods were returned, no duty claimed, nor even alleged to be payable at any time—and the probability on the face of the case is that duty could not be claimed. When seized as a forfeiture they ought to have been condemned and disposed of, ch. 53, sect. 64; and the latter part of the very section relied on by defendants (32) says, they are to be delivered over to the proper officer when seized. Again, taking forcibly from the person is a breach of the peace, *Dalton*, c. 3; a party cannot retake *his own* goods, if by so doing he commits a breach of the peace, 3 *Bl. Comm.* 4; whether goods in personal use of a defendant

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can be seized under a *fi. fa.* does not seem expressly down. A doubt of it is expressed by *Parke B.* in *Sw v. Alford (a)*, who states that *clothes* on the *person* can be taken to secure payment of a bill. Goods in use could be distrained for rent; nor, as it is now held, even a *mage feasant*; *Storey v. Robinson (b)*. [*Coleridge J.* The *goods* were free from distress.] Only because and attached to the person, as here. It is true the action is only for goods: but still the taking of them was lawful, though the complaint is not of *all* the unlawful viz. the assault. In *Storey v. Robinson (b)*, though the action was for an assault also, yet the second plea which the Court gave judgment on was only as to *so much of the declaration as related to the taking of the goods* (a horse). It may, therefore, for the purpose for which alone the case is now cited, be regarded as an action for taking goods, and shews that in such case the action will lie. In *Haw v. Planner (c)* the plea justifying a churchwarden in taking off the hat of plaintiff, who wore it in church during divine service, states a prior request; and, generally speaking, where force is used demand should be made. These cases seem to recognize this principle throughout. A sheriff, though he cannot break open an outer door without a warrant, may break a chest; but under these acts an officer cannot break even a box without previous demand, ch. 53, sect. 14; and all the words used imply any thing but unnecessary force—"lock up, seal, mark, or otherwise secure." By ch. 53, sect. 40, persons are liable to a penalty for stopping their carts; but this attaches only on "*persons refusing when required so to do in the king's name*;" and sections giving right to search the person would surely imply the necessity of previous request, ch. 53, sect. 34, so to deny having foreign goods is a ground of forfeiture if such goods are afterwards found on the person, but of course only if the party has been questioned, ch. 53, sect.

(a) 3 M. & W. 254.

(c) 1 Saund. 11.

(b) 6 T. R. 138.

LORD DENMAN C. J.—Where no fraud is attempted in concealing articles from the officers, I have no hesitation in saying that, unless a previous demand is made by the officer, he is guilty of a trespass in taking the goods by force, but of a trespass to the person only. This action, however, is brought for a trespass in taking the goods; and if the goods were liable to be seized, as I think they were, the mode of making the seizure cannot affect the liability of the defendants on this head. In *Storey v. Robinson* (a), the taking of the plaintiff's horse was evidently stated in such a manner as to shew that the plaintiff was upon him, and therefore it involved a trespass to the person.

LITLEDALE J.—The officers were justified in making the seizure, for on the evidence it appears that they were drawings, which brings them within the terms of the act, and no exception is made in favour of any particular kind.

PATTESON J.—This is an action for taking goods only; and if any clause could be pointed out making a previous demand a condition precedent, no doubt an action would lie, but there is no such clause, and the general law is relied upon that there ought to be a previous demand. Supposing that to be so, yet, if the goods are forfeited, the act of taking of them cannot be invalidated by any excess or violence to the goods, but it affords a ground for an action of another kind.

COLERIDGE J. concurred.

Rule discharged.

(a) 6 T. R. 138.

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v.
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Wednesday,
May 8th.

PHILLIPS v. COLE.

In an action by the indorsee against the maker of a promissory note, where the plea alleged that the note was obtained from the defendant by fraud, and the name of *A.* (who had indorsed to the plaintiff) had been fraudulently indorsed, of all which the plaintiff had notice:—

Held, that the defendant was not at liberty to read letters of *A.*, written whilst he was holder of the note, which it was alleged would have implicated plaintiff in the fraud, for no evidence had been given to connect plaintiff with *A.* or to shew that the note had been indorsed to the plaintiff when overdue.

ASSUMPSIT on a promissory note made by defendant on the 1st of February, 1837, at three months date, indorsed by him to one *Alves*, and by *Alves* plaintiff. Plea, that there was no consideration defendant's making or indorsing the note, and that indorsed in blank and delivered to one *J. Williams* special purpose only for the benefit of the defendant, wit, that *Williams* should get it discounted for defendant. Averment, that *Williams* did not get the note discounted, and that whilst he so held the note the defendant requested him not to get the bill discounted, but to return it back to the defendant, but that *Williams*, in violation of good faith, and contrary to the special purpose for which he so received this note as aforesaid, afterwards, &c. fraudulently, and without the knowledge or consent of the defendant, and with intent to defraud the defendant, procured this note to be indorsed with the name of *A. Alves*, and delivered the same, so indorsed, to the plaintiff, who then took and received, and still holds the same without consideration, and well knowing that *Williams* had no power or authority to part with the same in manner aforesaid, and also well knowing that there was not, at any consideration or value for the defendant's making or indorsing the same as aforesaid. Averment of no consideration to *Alves* for becoming a party to this note, and that his name was indorsed on the note fraudulently and colourably, of which the plaintiff then had notice.

Replication de injuriâ.

At the trial, before *Littledale J.*, at the sittings of Trinity term, 1837, in Middlesex, the defendant's counsel stated that he should prove that the note in question was obtained from the defendant by fraud, of which the plaintiff was cognizant, and he proposed to prove these facts

the production of certain letters written by *Alves* whilst he was holder of the note; *Alves* himself not appearing when called on his subpoena. The admission of the letters was objected to by the plaintiff, and refused by the learned judge, and the verdict passed for the plaintiff.

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Hamfrey having obtained a rule nisi for a new trial, in the ensuing Michaelmas term, for the improper rejection of evidence,

Jervis and *Hoggins* shewed cause on a former day in this term (a). The declarations of a prior holder of a bill or note are not admissible in evidence against the indorsee, unless the two parties are identified in interest, or unless the latter has taken the bill after it became due, or without consideration; *Barrough v. White* (b), *Smith v. De Wruit* (c), *Batushamp v. Parry* (d), *Wellstead v. Levy* (e), *Duckham v. Wallis* (f), *Hedger v. Horton* (g). The reason is, that an indorsee of a promissory note does not obtain his title from the previous indorser, but in his mercantile character according to the custom of merchants. If indeed a party takes a bill after it is due, he takes it subject to all its equities, and declarations of a previous holder would be admissible against him; *Pocock v. Billing* (h): at least the dictum in that case can be supported on that ground only. Lord *Kenyon* indeed held, in *Clipsam v. O'Bryen* (i), that the declarations of the indorser of a bill were not admissible to impeach his indorsee's title, even when the indorsement was made after the note was due, but probably that decision cannot be supported. It may be admitted that if the plaintiff had been connected by evi-

(a) May 2, before Lord *Denman*
C. J., *Littledale*, *Patteson*, and
Coleridge, Js.

(b) 4 B. & C. 325; 8 C. 6 D.
& R. 379.

(c) Ry. and Moo. 212.

(d) 1 B. & Ad. 89.

(e) 1 Moo. & Rob. 138.

(f) 5 Esp. 251.

(g) 3 C. & P. 179.

(h) 2 Bing. 269.

(i) 1 Esp. 10.

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dence, in any fraud committed by *Alves*, with regard to the bill, the letters would have been admissible; *Peckham v. Potter* (a); but nothing of the kind was shewn in the present case.

Humfrey, contra. *Barrough v. White* (b) has gone further than any case hitherto, and it only decided that the declarations of a previous holder of a bill are not admissible to shew that he gave no value for it. Such evidence, it is evident, if admitted, would not affect a subsequent indorsee to whom the bill had been indorsed before it became due. Here the declarations were tendered to shew, not merely that there was no consideration, but that *Alves* had obtained the bill by fraud; the question therefore is very different. It is not contended that the evidence alone would have been sufficient to prevent the plaintiff's recovering, but the point is, as to how much evidence must be given in order to throw on the plaintiff the onus of proving consideration. It was once thought that, as soon as a bill appeared to be an accommodation bill, the plaintiff was called upon to prove the consideration; *Heath v. Sansom* (c); but although that decision has been overruled (d), it seems to have been considered, in *Mills v. Barber* (e), that as soon as the slightest suspicion of fraud was thrown upon the bill the *onus probandi* was cast upon the plaintiff. If, therefore, these declarations had been given in evidence here, the plaintiff, according to that case, would have had to prove value. So late as the case of *Shaw v. Broom* (f), doubts were entertained as to the admissibility of the declarations of a previous holder of a bill, Lord *Tenterden* having admitted them at *Nisi Prius*, and the sole ground on which the Court afterwards held that they ought not to have been received was, that the declarations were not made

(a) 1 C. & P. 232.

(b) 4 B. & C. 325; S. C. 6 D. & R. 379.

(c) 2 B. & Ad. 291.


(d) See *Percival v. Frampton*, 2

C. M. & R. 180.

(e) 1 M. & W. 425.

(f) 4 D. & R. 730.

till after the party had parted with the bill. This shews that the law laid down in *Barrough v. White* (a) is quite recent and ought not to be extended. In *Noel v. Rich* (b) it seems to have been held that proof of the bill having been fraudulently indorsed would have thrown the burden of proof on the plaintiff, which is all that is sought to be established now.

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 v.
 COLE.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court, and after stating the pleadings and the facts, continued thus:—It was argued that the letters were admissible on two grounds: first, as declarations made not only against the interest, but in acknowledgment of the fraud of the party making them; and, secondly, as made by one under whom the plaintiff, being a subsequent holder, claimed. With regard to the first of these, it is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interest of those who made them. The general rule of law that the living witness is to be examined on oath, is not subject to any exception so wide; and we are of opinion that the circumstance of fraud being acknowledged introduces no difference in principle; that acknowledgment would certainly make the evidence, if receivable, more weighty, but only upon the ground that it is more strongly against the interest of the party, than any merely pecuniary consideration could make it; the ground of its admission would be the same in either case; and the same objection applies in both, the want of community of interest. The second ground, if it could have been established in fact, would have made the letters admissible; but, when they were tendered, no evidence had been offered which either directly or indirectly connected the plaintiff with

(a) 4 B. & C. 325; S. C. 6 D. & R. 379. (b) 2 C. M. & R. 360.

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Alves; he had a title of his own as indorsee, and have an indefeasibly good title, though Alves had all. Nothing like want of consideration or that taken the note overdue was shewn; under these stances we hardly want an authority for holding plaintiff's title is not to be affected by the declaration Alves, who might have been called; but *Barrough v. and Beauchamp v. Parry (b)* are, among others, It was said that the letters themselves would have fraud, and brought the plaintiff into privity with them but whatever is a preliminary necessary to the admission of evidence, must be proved *aliunde* before such is admitted.

The letters were therefore rightly rejected, and for a new trial must be discharged.

Rule discharged

(a) 4 B. & C. 325; S. C. 6 D. (b) 1 B. & Ad. 89. & R. 379.

DOWN v. GEORGE HATCHER and CHARLOTTE
Executrix of LUKE ROGERS.

Wednesday,
May 8th.

A plea of payment of a smaller sum of money in bar of a claim for a larger sum, in indebitatus assumpsit, is not cured by verdict.


INDEBITATUS assumpsit in 300*l.* for the use and occupation of a dairy by *Luke Rogers* in his lifetime. Second count, in 100*l.* for agistment of cattle by the plaintiff against the said *Luke Rogers*. Third count, on an account stated between the plaintiff and *Luke Rogers*; averment, that the plaintiff had received 158*l.* 5*s.* 8*d.* on account of the said several sums of money, yet the residue thereof 500*l.*, remained unpaid, and the said *Luke Rogers* died in his life-time, and the said defendant *Charlotte*, as executrix &c., since his death, and before her marriage with the said defendant *George Hatcher*, and the said defendant and her intermarriage, had not paid, &c. Plea, as to the residue due of the said sums of money in the declaration made

that after the making of the promise therein mentioned, and before the commencement of the suit, to wit, on &c., the defendant *Charlotte*, as executrix, &c., paid to the plaintiff 6*l.* 10*s.* in full satisfaction and discharge of the said residue, &c., and of all causes of action in respect thereof, and the plaintiff then accepted the said 6*l.* 10*s.* in such full satisfaction and discharge as aforesaid. Verification.

Replication, that defendant, *Charlotte*, did not pay modo et formâ, &c. At the trial of the cause before *Patteson J.* at the Somersetshire Summer assizes, 1837, the verdict passed for the defendants.

Barstow, in the ensuing Michaelmas term, having obtained a rule nisi for judgment *non obstante veredicto*,

F. N. Rogers and *Fitzherbert* shewed cause on a former day (a) in this term. The objection made to the plea is, that payment of a smaller sum in satisfaction cannot be a bar to an action for a larger sum. But the claim of the plaintiff here is for unliquidated damages, and *Wilkinson v. Byers* (b) shews there may be cases where the payment of a smaller sum is a good answer to a claim for a larger. It may be admitted that this plea would be bad on demurrer, Com. Dig. Pleader (E. 1), *Cumber v. Wane* (c), *Thomas v. Heathorn* (d); but the question is, whether it may not be supported after verdict. As there are circumstances under which payment of a smaller sum is a good answer to an unliquidated demand, instances of which are collected in 1 *Smith's Leading Cases*, 147, after verdict it will be implied that such circumstances were found here to the satisfaction of the jury. In no case has it been held, that such a plea is not good after verdict; and *Wright v. Acres* (e), according to one report of the case (f), shews, that after

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 v.
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(a) May 5, before Lord Denman C.J., *Littledale, Patteson, and Coleridge, Js.*

(b) 3 N. & M. 853.

(c) 1 Str. 426.

(d) 2 B. & C. 417; S. C. 3 D. & R. 647.

(e) 6 A. & E. 726; S. C. 1 N. & P. 761.

(f) Will. Woll. & Da. 329.

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verdict such a distinction may be drawn. They also cited *Mee v. Tomlinson* (a), *Lynn v. Bruce* (b), *Fitch v. Sutton* (c), and *Jourdain v. Johnson* (d).

Barstow, contra. The plea is acknowledged to be bad on demurrer, and there is no case to shew that it is good after verdict. The only defects that a verdict cures, according to the rule laid down by Serjeant *Williams* in his note to *Stennel v. Hogg* (e), are defects of substance or form which must necessarily have been proved at the trial, but the defect now relied upon, is, that an insufficient answer in law is set up, and therefore the fullest proof of that at the trial cannot aid the defendants. The only issue was whether the money was accepted in satisfaction, the Court therefore cannot go out of the plea to suggest a possible state of circumstances in which a valid contract might have been formed.

Cur. adv. vult.

Lord *Denman* C. J. on this day said, we are of opinion that the plea is bad, and is not cured by verdict, and that there must be judgment for the plaintiff *non obstante verdicto*.

Rule absolute.

(a) 4 A. & E. 262; S. C. 5 N. & M. 624.

(b) 2 H. Bl. 317.

(c) 5 East, 230.

(d) 2 C. M. & R. 564.

(e) 1 Wms. Saund. 227, n (1).

Friday,
April 26th.

TURNER v. ROOKS.

Where a husband, separated from his wife, by his violent conduct renders it necessary for

her to exhibit articles of the peace against him, he is liable for the expenses thereby incurred, although he allows her a separate maintenance.

ASSUMPSIT on an attorney's bill. Plea, non assumpsit. At the trial, before *Maule* B. at the last Somersetshire assizes, it appeared that the action was brought to recover the expenses of suing out articles of the peace by the wife

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of the defendant against her husband. The defendant proved that his wife was separated from him, and that he allowed her a separate maintenance of 112*l.* a-year, and it was contended that the plaintiff was not entitled to recover. The learned baron told the jury that, if they thought the wife had reasonable ground for suing out articles of the peace (of which evidence was given), they should find a verdict for the plaintiff, which they did, with 18*l.* 5*s.* damages.

Crowder, on a former day (*a*) in this term, moved for a new trial, on the ground of misdirection. Assuming that a necessity existed for suing out articles of the peace, it was incumbent on the plaintiff, in order to sustain his action, to shew that the separation was caused by the improper conduct or was with the consent of the husband. For it is only in such cases that the wife has power to pledge her husband's credit for necessaries; *Hindley v. The Marquis of Westmeath* (*b*). The learned baron, however, did not call the attention of the jury to this point. Secondly, as the wife was proved to have a separate maintenance, the husband is not liable in any way. [Lord *Denman* C. J. The separate maintenance is to provide her with necessaries due to her station in life, but I doubt whether it bears on the question. The husband is bound to protect his wife, even though living in a state of separation; and it is clear that the deed of maintenance could not contemplate an item like the present. But we will speak to my brother *Maule*.]

Cur. adv. vult.

LORD DENMAN C. J. now delivered judgment. In this case a new trial was moved for, on the ground of misdirection. The action was for work and labour performed

(*a*) April 20th, before Lord Denman C. J. *Littledale*, *Patteson*, and *Soleridge*, Js.

(*b*) 6 B. & Cres. 200; S. C. 9 D. & R. 351.

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by the plaintiff as an attorney, in the exhibiting articles of the peace against the defendant, on behalf of his wife. The defendant and his wife were separated; and the first question was, whether the evidence was sufficient to warrant the exhibiting articles of the peace, and we think it was. The next question was, whether the defendant was liable, as he allowed his wife a separate maintenance. It appeared that the defendant had used great violence towards her. It was his own misconduct, therefore, that made the work and labour, which was the subject of the action, a necessary, and he cannot, therefore, be allowed to set up the separate maintenance to exempt himself from liability.

Rule refused.

Thursday,
May 2d.


GREGG v. WELLS.

Where the plaintiff, who was owner of the goodwill and fixtures of a public-house, allowed *A. B.* to represent himself as such to the landlords, and the latter thereupon let the public-house to *A. B.*, and *A. B.* sold the lease and fixtures to the defendant, who was informed by the landlords that *A. B.* was their tenant:—Held that the plaintiff had estopped himself from recovering the

TROVER for the fixtures, &c. of a public house. Pleas: first, not guilty; second, that the plaintiff was not possessed as of his own property.

At the trial before Lord *Denman* C. J. in Middlesex, at the sittings after Trinity term, 1837, the plaintiff proved that in 1835 he bought the good-will, fixtures, and furniture of a public-house, called the “Old Duke of Cumberland,” and belonging to Messrs. *Elliot*, the brewers, from a person of the name of *Gregory*, and that he put into the house a man of the name of *Heath*, whose name was put over the door, and who carried on the business. *Heath* soon after retired from the trade, and the plaintiff agreed, the 1st January, 1836, with one *Durham* to let the public-house to him, and an agreement was accordingly drawn up between them, and *Durham* entered into possession, the licence being transferred to him by *Heath*. *Durham* in 1836 gave up the premises to the defendant, who, on the plaintiff claiming fixtures from the defendant, who had purchased *bonâ fide*.

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the property, stated that he had bought every thing of *Durham*, and refused to give up possession. The defendant's case was, that, in consequence of an advertisement in the newspaper of a public-house to let, he saw *Durham*, who stated that he was the tenant to Messrs. *Elliot* of the Duke of Cumberland, and that he wished to let it, and sell the fixtures at a valuation. The defendant applied to Messrs. *Elliot*, who stated that *Durham* was their tenant, and agreed to accept the defendant: he thereupon concluded an agreement with *Durham* to buy the good-will at 100*l.*, and to take the fixtures at a valuation. A valuation was accordingly made, and possession given thereupon to the defendant. A clerk of Messrs. *Elliot* also proved that the Duke of Cumberland had belonged to them for forty years, and that he recollected its being let by Messrs. *Elliot* to *Durham* on January 8th, 1836. He stated that possession was given by *Gregg*, on the part of *Heath*, to *Durham*, the late tenant, and he supposed from this that the premises had never been let to *Gregg*, and that Messrs. *Elliot* had no knowledge that the good-will and fixtures belonged to *Gregg*, and that if they had been aware of that fact they would not have accepted *Durham* as tenant. The agreement between Messrs. *Elliot* and *Durham* was also produced, and this witness proved that it was altered by *Durham* in *Gregg*'s presence. It was dated 8th January, 1836, and contained a demise of the "Duke of Cumberland" to *Durham* for one year at seventy guineas per annum, and amongst other covenants, it contained one by *Durham* that whenever he should quit the premises whatever amount was due from him to the Messrs. *Elliot* should be deducted by the brokers from the amount of the valuation of the goods and effects of *Durham* and be paid to the *Elliot*s. His lordship, upon this evidence, left it to the jury to say, whether in their opinion *Gregg* had stood by and allowed *Durham* to hold himself out to the world as the owner of the property; and that if they thought so, and that the defendant had bought it in

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consequence of such misrepresentation, they should find a verdict for the defendant on the second issue; the jury having found accordingly,

Platt, in the ensuing Michaelmas term, obtained a rule nisi for a new trial, on the ground that, if this ruling were correct, a landlord could never have any safety in letting furnished premises to a tenant.

Sir *F. Pollock* and *M. Chambers* now shewed cause. If the plaintiff, by his conduct, caused the defendant to suppose that *Durham* was the owner of the property in question, he cannot afterwards, on a sale of the property by *Durham* to the defendant, turn round and recover it back; *Pickard v. Sears* (a). That case shews that the opinion of the jury was properly taken as to whether the acts of the plaintiff were such as to induce the defendant to believe that *Durham* was the bonâ fide owner of the property. If therefore there was any act of this kind to be left to the jury, the verdict cannot be disturbed. But this fact was proved on the agreement being entered into between *Elliot & Co.* and *Durham*; the goods on the premises are described as belonging to *Durham*, and as pledged by him to the *Elliot*s, and *Gregg* was present whilst the terms of this agreement were discussed. It was also proved that Messrs. *Elliot* would not have accepted *Durham* as tenant, unless they had believed him to be owner of the goods. The act therefore of the plaintiff amounted to a representation that *Durham* was the owner of the goods. Formerly the rule was considered to be that the real owner of goods in a case like this did not lose his right to recover, unless a party had been induced to purchase from the apparent owner by fraud; but now it is established that, if the owner allow his property to be dealt with under his eyes, without offering any interference, the property passes. Even in a case between two innocent parties, the rule of law

(a) 6 A. & E. 469; S.C. 2 N. & P. 488.

is, that the loss must fall on the side where the negligence has been. And it is clear that the defendant took all the care a reasonable man could; he found *Durham* displaying all the indicia of property, and on inquiry of his landlord he is informed that he is the actual tenant. By whose means did *Durham* acquire that character? If by the plaintiff's, it is clear that the negligence is his. It is not, therefore, like the case of *Hartop v. Hoare* (a), where the plaintiff took all possible care to prevent the bailee from having more than a special property in the goods entrusted to him. In *Bac. Abr. Trover, C.* (b), it is laid down, "if the bailee of goods give them to a stranger and deliver them, the bailor cannot maintain the action (trover); for by the gift and delivery of a person, who has a special property in and a possession in fact of the goods, the general property of the bailor is divested." This is not expressly in point, without a qualification; but it shews that, if the bailor by any indiscretion allows the bailee to have the semblance of property, he cannot afterwards dispute the transfer of the property by the bailee to a third party. *Hunsden v. Cheyney* (c) and *Hill v. Gray* (d) also shew that, where a person has stood by and allowed a party to purchase under a delusion, he cannot maintain an action. In *Com. Dig. Action on the Case for a Deceit* (A 1), it is laid down that an action upon the case for a deceit will lie where a man does any deceit to the damage of another; and it might be contended that the plaintiff has made himself liable to such an action.

Platt and Knowles, contra. The question here is between two innocent parties, to neither of whom negligence is attributable, and the case is simply whether, if the tenant of premises chooses to sell the furniture, &c. the real owner can recover it back. *Hunsden v. Cheyney* (c) and *Hill v. Gray* (d) are wholly inapplicable, for they were

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(a) 1 Wils. 8.

(b) 7 Bac. Abr. 803, 7th ed.

(c) 2 Vern. 150.

(d) 1 Stark. N. P. 434.

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both cases of fraud, which cannot be alleged here fallacy in the argument derived from *Pickard v. S* is, that there the representation was made directly purchaser, here, whatever representation was made to third parties not connected with the plaintiff defendant. [*Coleridge J.* referred to *Owen v. Knight*] That case is distinguishable.

LITLEDALE J.—There are two questions made case; one, that my lord misdirected the jury, so that the jury have come to a wrong conclusion on the The direction to the jury was in substance quite in accordance with the principle laid down in *Pickard v. S* that, “where one by his words or conduct wilfully induces another to believe the existence of a certain state of and induces him to act on that belief, so as to own previous position, the former is concluded from against the latter a different state of things as existing same time.” Then the question, whether the jury came right conclusion, is one upon which much may be said but I cannot say the verdict is wrong.

PATTESON J.—When the facts are understood, it that the direction was perfectly right, although when rule was moved for it appeared otherwise, as not a when then said about the agreement with the Messrs. *Ell* no such transaction had taken place, I should have been different opinion. I am far from saying that, if a person a ready-furnished lodging, he gives the tenant an authority to sell the furniture, for that, of course, is not warranted by any authority. But here, a few days after the agreement between the plaintiff and *Durham*, the latter became tenant of the *Elliot*s, within the knowledge of the plaintiff and by an agreement, also known to the plaintiff, .

(a) 6 A. E. 469; S. C. 2 N. & P. 488.

(c) 6 A. & E. 474; S. & P. 491.

(b) 4 Bing. N. C. 54.

gives the *Elliot*s a power over his furniture, which is described as his. Now the plaintiff is present at the concoction of this agreement, and does not let fall a word to let the *Elliot*s suppose that *Durham* is not the real owner. If therefore the *Elliot*s stood in the place of the defendant, the case would fall completely within *Pickard v. Sears (a)*, but they do not, and on that ground the case is sought to be distinguished. But what are the facts; the defendant sees an advertisement of a public house to let, in the trade of Messrs. *Elliot*. He sees *Durham*, and applies to Messrs. *Elliot*; whose fault was it that the *Elliot*s could not inform him that *Gregg* was the true owner of the house?—*Gregg*'s undoubtedly. *Pickard v. Sears (a)* therefore is a direct authority, and the direction to the jury was perfectly right.

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COLERIDGE J.—If the summing up was right, it is impossible for us to quarrel with the finding of the jury. We need not go further back than to inquire how the case would be if the *Elliot*s were the defendants. The question then would be, whether, from the representations of the plaintiff, they had reason to believe that *Durham* was the true owner of the goods; if so, they could resist the action; and if so they could give a title. Then the question is, whether *Durham* has not been enabled, by what the plaintiff did, to hold himself out as the true owner. I think he has. It must be taken as the final result of the evidence that the plaintiff knew of the agreement between *Durham* and the *Elliot*s. The fair inference from that is, that he permitted the *Elliot*s to believe that *Durham* was the true owner.

LORD DENMAN C. J.—I intended to sum up to the jury the principle laid down in *Pickard v. Sears (a)*, which was present to my mind at the time. It seemed to me that the question, whether the plaintiff stood by and allowed

(a) 6 A. & E. 469; S. C. 2 N. & P. 488.

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Durham to hold himself out as owner of the property, was a question for the jury, and I cannot think that it makes any difference whether the representations be made to a party directly as in *Pickard v. Sears*, or in such a manner that the defendants might be induced to act upon them.

Rule discharged.

Monday,
April 29th.

DOE d. MAYHEW v. ASBY.

Courts of common law have no jurisdiction to stay proceedings in ejectment brought on a clause of re-entry for breach of covenant to repair.

KELLY, in Michaelmas term 1837, had obtained a rule to shew cause why all proceedings in this action should not be stayed upon payment of costs.

From the affidavits filed on either side, it appeared that the action was brought to recover premises, which the defendant held for the remainder of a term, on the ground of forfeiture for non repair: the defendant held subject to a general covenant to repair, and a covenant to repair after three months' notice, and to a proviso for re-entry, in case of breach of any of the covenants. On the 17th March 1837, a three months' notice to repair was given. The notice not having been complied with, this action was brought; some time after which the repairs were commenced, and it was stated that they were not completed at the time of obtaining the above rule, but on this point the affidavits were contradictory.

R. V. Richards, in shewing cause against the rule, impugned the authority of *Hack v. Leonard*, 9 Mod. 91,—[*Littledale J.* The ninth volume of those Reports is ever a worse authority than the tenth.]—and *Sanders v. Pope* (a) and cited *Hill v. Barclay* (b), *Bracebridge v. Buckley* (c), *Eden on Injunctions*, p. 26, *Comyns' Landlord and Tenant* p. 566, 2nd ed., and *White v. Warner* (d), to shew that ever

(a) 12 Ves. 282.

(b) 18 Ves. 56.

(c) 2 Price, 200.

(d) 2 Mer. 459.

a Court of Equity would not interfere in a case like the present: he also relied on *Doe v. Masters* (a).

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Arnold, on the same side, was stopped.

Kelly contrâ, contended that provisoes for re-entry were not to have so stringent an effect given them as conditions at common law, *Doe v. Elsam* (b); and stated that the Court of Common Pleas had recently interfered after judgment, in the way prayed by the present rule, on payment of costs as between attorney and client, but that he had not been able to obtain a report of the case.

LORD DENMAN C. J.—In that case probably the Court interfered, as it often does, merely to assist any voluntary arrangement between the parties. The interference would have been in invitum, or the case would have been reported. We have no jurisdiction whatever to grant this application. If we had jurisdiction, it would be most inconvenient to exercise it in questions embracing disputes as to the condition of premises, and wherein we should have no means of deciding satisfactorily.

LITLEDALE J. concurred.

PATTESON J.—We granted this rule under the impression that the plaintiff had waived his right on the general covenant by giving notice to repair under the particular covenant, that the notice had been complied with, and that, notwithstanding, it was sought to insist on a forfeiture under the general covenant. Even then it is doubtful whether we would interfere, but in this instance there has been a breach of the particular covenant.

COLERIDGE J.—The strongest way in which the defendant can put his case is, that the circumstances dis-

(a) 2 B. & C. 490; S. C. 4 D. & R. 45.

(b) Moo. & Malk. 189.

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closed would be an answer to the action. Even
could not take upon ourselves to decide what is
of fact for a jury.

Rule disc

Tuesday,
May 7th.

PRICE v. POPKIN.

An action in
covenant and
all matters in
difference were
referred. The
arbitrator re-
cited that
among other
matters in dif-
ference it was
referred to him
to say, whether
certain grates,
&c. were part
of the demised
premises, and
further to or-
der what
should be done
to make a final
determination
of such matters
in difference.
He awarded
certain da-
mages to the
plaintiff on the
issues in the
declaration,
and found that

BY an order of a learned judge, this cause, which
covenant for breaches of covenants to repair a
house demised by the defendant to the plaintiff
matters in difference between the parties were re-
ferred to a barrister, the costs of the suit to abide the event.

The arbitrator made the following award, in which
reciting the order of reference, and that "the
cause, among other matters in difference, have
to me to say and adjudge whether certain grat-
es, bolts and fastenings, were part and parcel of the
premises in the declaration named, and further
to adjudge what shall be done to make a final
determination of such matters in difference," he
found that a verdict should be entered for the plaintiff on
the issues, with 10*l.* damages on the first, and 110*l.*
on the second issue; "and further I do find, that
the grates, &c. were part of the demise of the defend-
ant to the plaintiff, and were removed and carried away by the defendant, and applied to his own use,
and that they were of the value of 11*l.* 5*s.*, and he ordered the plaintiff to fix and set up
such grates, locks, &c. in the place and stead of such as were removed as aforesaid, and to
leave the same to and for the use of the defendant at the end of the term, and the
defendant should pay to the plaintiff the sum of 11*l.* 5*s.*

The affidavit of the defendant having denied that the power was given to the
arbitrator to order what should be done by the parties as to the grates, held, that
the award was bad, as the arbitrator had exceeded his power, and the award itself
was certain in not specifying the quality and price of the grates to be set up.
that, as the matter in difference as to the grates was one of the matters submitted
to the arbitrator, the finding on that being bad, the whole award must be set aside.

Semble, that, when an arbitrator has directed a verdict to be entered with
authority, if the award disposes of all the matters referred to independently of that
part of the award may be rejected.

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plaintiff, and that they were removed and carried away from the dwelling-house, in the declaration named, by the defendant, and applied to his own use, and I do adjudge such fixtures so removed to be of the value of 11*l.* 5*s.*, and I do order and direct the plaintiff to fix and set up other grates, &c. in the place and stead of such as were removed as aforesaid, and to leave the same to and for the use of the defendant at the end of the term; and I do accordingly order that the defendant shall pay to the plaintiff on &c., the several sums of 10*l.*, 110*l.* and 11*l.* 5*s.*, and that the plaintiff shall receive the same in full satisfaction and discharge of any claim by him made for damages in the said suit, and in the matter of difference between the parties.

Sir *W. W. Follett* on a former day in this term obtained a rule nisi to set aside the award, on the grounds—1. that the arbitrator had no power given him to enter a verdict; 2. That the award was uncertain, in not stating the quality, price, &c. of the grates and locks to be set up; 3. That the arbitrator had no power to direct the plaintiff to put up such grates; 4. That the award as to the grates &c., did not pursue the terms of the submission, inasmuch as the question as to them was stated in the recital to be, whether they formed part of the demise, and the award determines another question, viz. that they were removed and carried away by the defendant. The affidavits on which the rule was obtained denied that the defendant had agreed to refer to the arbitrator to order what should be done to make an end of the plaintiff's claim for damages to divers locks, grates, &c. alleged to have been removed by the defendant.

The affidavits in answer stated that the plaintiff's claim as to the grates was specifically brought before the notice of the arbitrator.

W. H. Watson now shewed cause. 1. The arbitrator certainly had not the power to order a verdict to be en-

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tered, but, as the finding is complete without the verdict that part of the award may be rejected; 2. As to the uncertainty of the award, the rule is clear, that the Court will not intend an award to be uncertain, unless the uncertainty is distinctly made to appear by extrinsic evidence. I doubt the terms of the award might make it uncertain what sort of locks and grates were to be set up, but the affidavits do not allege that there is any uncertainty in fact, and therefore the Court will not presume that the award is uncertain; *Cargey v. Aitcheson* (a), *Hanson v. Liversedge*, *Wohlenberg v. Lageman* (c). 3. Then it is said that the arbitrator had no power to direct the grates to be put up for the plaintiff, but he recites that it was submitted to him that he should order what was to be done between the parties; besides this part of the award may be rejected if it is an excess of authority, as he has found what was the value of the locks which were removed by the defendant. 4. The finding of the arbitrator as to the locks, &c. sufficiently ranges itself under the terms of the submission, for it finds in fact that they were part of the demise.

Crowder, contra. Independently of the verdict, which, if allowed, is ordered to be entered without authority, the award is not final, as it is impossible to say what is the event of the suit. In the matter of *Leeming and Fearnley* (d), where a replevin suit and all matters in difference touching the dispute were referred, the costs to abide the event of the suit, and the arbitrator awarded that the rent was 14*l.*, and that was due for rent, and that the plaintiff in replevin should pay the defendant 6*l.*, it was held that the award was bad because the arbitrator had not determined the suit. [*Patteson J.* In that case the arbitrator had awarded a *stet processus*, which he had no power to do, because then the successful party would not be entitled to costs. *W.H. Watson.* That case

(a) 2 B. & C. 170; S. C. 3 D. & R. 433; in error, 2 Bing. 199.
(b) 2 Ventr. 242.

(c) 6 Taunt. 254.
(d) 5 B. & Ad. 408; S. C. 1 & M. 232.

much considered in *Eardley v. Steer* (a), and was thought to have proceeded on the particular form of the pleadings.]

2. It is not necessary to shew by affidavit that the award is uncertain, when the uncertainty appears in the very terms used by the arbitrator. How can it be ascertained from this award what sort of locks and grates and how many were to be set up? If he had directed locks and grates to be put up of the same kind as those taken away, that would have been sufficient. But he has not done so; there are several cases on this point commencing with *Pope v. Brett* (b), and collected in *Watson on Awards*, p. 167, et seq. (2d ed.); 3. No authority was given to the arbitrator to order grates to be put up by either party. Very often the order of reference gives the arbitrator power to order what shall be done, but when that power is not expressly given, it is an excess of jurisdiction to make any order on the subject.

LORD DENMAN C. J.—There are two substantial objections to this award. First of all, the arbitrator has ordered matters to be done which he had no authority to order, and secondly, he has not ordered them to be done in a specific and certain manner, so as to make it possible to say that the award can be strictly obeyed. For these reasons we think the award bad.

LITTLEDALE and PATTESON Js. concurred (c).

W. H. Watson submitted that these objections only applied to part of the award as to the grates, and that the remainder was good.

PATTESON J.—No; the difference as to the locks and grates was referred to the arbitrator, and it has not been determined.

Rule absolute.

(a) 2 C. M. & R. 327.

(b) 2 Saund. 292.

(c) *Coleridge J.* was in the Bail Court.

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Thursday,
April 18th.

A broker, a member of the Stock Exchange, has an implied authority to act according to its rules, whether his employer is cognizant of them or not.


Where, therefore, such broker having entered into a contract for the sale of stock, which was not fulfilled by his principal, the stock was re-purchased at a higher price by the broker of the vendee, and the selling broker paid the difference and the commission, on such re-purchase, he may recover the amount of such payment by shewing that it was compulsory upon him by the rules of that society, and also the amount of his own commission on the original sale.

SUTTON and others v. TATHAM.

ASSUMPSIT by the plaintiffs, as brokers and the defendant, for work and labour and commission paid, and on an account stated. Plea: Non assumpsit.

At the trial before Lord *Denman* C. J. at the sittings after last Hilary term, it appeared that the defendant on the 28th May, 1838, had given instructions to the plaintiffs, who were members of the Stock Exchange, to sell for him 250 South Australian shares. The defendant had in fact 100 only of these shares. He was desirous of obtaining 250*l.* by a sale of 500 shares, which would have been sufficient for the purpose. He inadvertently expressed himself so that it appeared that 250 shares were to be sold, and not so many as to produce 250*l.* The plaintiffs, however, before they were apprised of his error, had contracted for the sale of 250 shares. The purchaser was informed of the mistake, but refused to rescind the contract, and the defendant on the 12th June, refusing to perform it, the purchaser on the 3d July, employed a broker to purchase 209 shares, as the price had risen in price since the date of the contract. The plaintiffs proposed to shew that, by the rules of the Stock Exchange, when the selling broker does not perform his contract, notice is given that the stock contracted for will be sold for the purchaser, and that the selling broker is obliged to pay the pain of expulsion from the Stock Exchange, to the difference in price, if it has risen since the date of the contract, and also the commission on the second sale. The plaintiffs had paid the difference in the price of the shares together with the broker's commission on the re-purchase, and this action was brought for the amount so paid, and also for the amount of their own commission on the original sale. Evidence of these rules was objected to on the ground that they were not binding upon the defendant, who was a stranger to them. It was also conte

the authority of *Child v. Morley (a)*, that a broker contracting for the sale of stock for a principal, who refuses to perform the bargain, cannot, after paying any difference in the price of such stock, recover the amount so paid as money paid for his principal, so that the payments in this case were voluntary. His lordship received the evidence, and directed the jury that a party employing a broker on the Stock Exchange must be taken to authorise him to act according to the rules of that society, although the principal himself may not be cognizant of them, and with regard to the re-purchase of the shares, left it to the jury to say whether the bargain was made within a reasonable time. The jury found a verdict for the plaintiffs for 52*l.* 5*s.*, the amount of the two commissions only.

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Sir *F. Pollock* now moved for a new trial, on the ground of the misreception of evidence, relying on the ground taken at the trial, and on the case cited of *Child v. Morley (a)*.

LITTLEDALE J.—A person employing a broker on the Stock Exchange is bound by their rules, whether he is cognizant of them or not.

PATTESON and COLERIDGE Js., and Lord DENMAN C. J. concurred.

Rule refused.

(a) 8 T. R. 610.

STALEY *v.* FRANCIS BEDWELL.

Wednesday,
 May 8th.

A WRIT of fieri facias in this cause was delivered to the sheriff of Gloucestershire in September, 1838, under which An issue was directed, under the Interpleader Act between the claimant and execution creditor, the costs of the issue to abide the order of the Court. The claimant claimed the whole of the goods seized, but proved his right to part only:—Held, that he was entitled, notwithstanding, to the general costs of the issue, as if he had been plaintiff in trover, and also to the costs of the original and subsequent application to the Court.

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he seized certain household furniture and also certain office furniture in a house in Stroud. At the time of the seizure *Thomas Bedwell*, a brother of the defendant, was residing in the house, and carrying on the business of an attorney there, and was then in the actual possession of all the furniture seized. It appeared that the two brothers had formerly carried on the business of attorneys in partnership in a part of the same house, and at the time of the seizure the name of the firm, "*Messrs. Bedwell*," was still remaining on the door, but about three months before the seizure the defendant left this country. On the sheriff making the above seizure, *Thomas Bedwell* claimed the whole of the goods seized as his own exclusive property, and the sheriff thereupon made application to a judge at chambers under the Interpleader Act, upon which *Coltman J.* made the following order:—

That the goods seized by the sheriff should be sold, and the proceeds be paid into Court, unless the claimant, *Thomas Bedwell*, should give security for the return of the same; that an issue with three counts should be tried at the next Gloucester assizes, in which *Thomas Bedwell* should be plaintiff, and the plaintiff in this action (*Staley*) should be defendant, to try the question, 1. Whether the goods seized were, or any part thereof was, the sole property of *Thomas Bedwell* at the time of seizure. 2. Whether they were, or any part thereof was, the sole property of *Francis Bedwell* at the time, &c. 3. Whether they were, or any part thereof was, the joint property of the *Bedwells* at the time, &c. That in case the jury should be of opinion that the whole of the said goods were not the sole property of either of them, or the joint property of both, it should be specially found what part, if any, was the sole property of *Thomas* or of *Francis*, or what, if any, was their joint property, and the value of such part or parts; the costs of the issue to abide the further order of the Court. That the sheriff's cost of keeping possession to the time of sale

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or security be paid by the claimant; the residue of the sheriff's costs and the poundage and the return of the goods to abide the further order of the Court.

The claimant not having given security, the sheriff sold, and the net produce was paid into Court, in pursuance of the order.

The issues came on to be tried at the Gloucestershire spring assizes, 1839, when the jury found the value of the household and office furniture respectively; that the household furniture belonged to *Thomas Bedwell* the claimant exclusively, and that the office furniture belonged to him and his brother jointly as partners. On the first and third issues, therefore, the verdict was entered for the claimant so far as respected the household furniture, and for the execution creditor so far as respected the office furniture. The second issue was found entirely for the claimant.

Gray, on a former day in this term, obtained a rule, calling on the execution creditor and the sheriff to shew cause why the net sum realized by the sale of the household furniture, and a moiety of the net sum realized by the office furniture, should not be paid out of the Court to *Thomas Bedwell*, and why the plaintiff should not pay him his costs incurred in consequence of the seizure, and also of the application made to this Court and a judge at chambers, and of the feigned issues, and of this application, deducting therefrom the plaintiff's costs, if any, of the issues partially found for him.

W. J. Alexander now shewed cause for the execution creditor (a). The sheriff ought to pay the costs of the applications, as they were incurred in consequence of his act, in seizing goods which it turns out that he had no right

(a) So much only of the facts and argument in this case has been noticed as related to the costs of the respective parties.

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to seize. At any rate the claimant is not entitled to call the execution creditor to pay them, for his claim is found to be to a certain extent unfounded; if it had been proved confined to his own goods, perhaps the execution creditor would have been contented with the residue. Both parties have succeeded to a certain extent, and both have failed to a certain extent, and therefore one ought not to pay the costs of the applications more than the other. In respect to the issues some have been found for the execution creditor and some for the claimant; there can be no necessity for any special direction, therefore, as to the taxation of the costs of the issues; the Master can tax against the execution creditor and the claimant the costs of the issues found for each respectively.

Whitmore for the sheriff. 'The sheriff is entitled to the costs on the original and the present application. The rule nisi does not provide for the payment to the sheriff of his possession money, to which he was entitled under the order. He was obliged to appear, therefore, in order to obtain that sum to which he is clearly entitled.

Gray contra. The sheriff never is allowed the costs of the applications; the Courts hold that he must bear the expenses himself if he seeks benefit from the Interpleader Act; and he had a remedy for his possession money under the order. But the most important question is whether the claimant be entitled to have his costs paid by the execution creditor. With a view to the determination of this question, the position in which the claimant was before the Interpleader Act have been, independently of the Interpleader Act, to be looked at. It is now to be assumed that the sheriff seized some goods belonging to the defendant and some belonging to the claimant. Before the Interpleader Act the claimant would have brought an action of trover against the sheriff for the whole of the goods; he would have succeeded to the extent of what belonged to himself.

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would have failed to the extent of what belonged to the present defendant, but the result as to costs would have been that the claimant would have been entitled to the general costs of the cause. Then the only effect of the Interpleader Act is to substitute the execution creditor for the sheriff; indeed, before that act he was always in this same position where he had indemnified the sheriff. The Interpleader Act was not intended to put the claimant in a worse position than before, but merely to compel the execution creditor to take the consequences of those acts which are done by the sheriff for his benefit, and which he in fact adopts by agreeing to maintain them on the trial of the feigned issue. In general an action would try the question between the parties as well as an issue, and is, in fact, frequently adopted; but, where an issue will do as well, it is adopted only because it saves all the expense of the writ and other preliminary proceedings. If the question in the present instance had been tried by an action, the claimant would clearly have been entitled to the general costs, and the circumstance of an issue being adopted is not one which can have the effect of depriving him of such costs. The claim to these costs is resisted on the ground that the claimant made a claim which has partly turned out to be unfounded, and that two of the issues have been partially found against him. But that is the case with respect to one half the actions which are tried; it constantly happens that a plaintiff recovers in respect of less than he has claimed; but, if he recovers at all, he is entitled to the general costs. The execution creditor affirmed the sheriff's act, as to the household furniture, by maintaining it in the issue. The costs, therefore, of the original application, of the trial, and of the present application, would all have been incurred, if the claim by *Thomas Bedwell* had not been too large.

Lord DENMAN C. J. — The claimant is entitled to the general costs, deducting the costs of any disputed facts in

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which the plaintiff has succeeded. It is as if the claimant had succeeded in an action of trover. He must also pay the costs of the applications.

LITLEDALE J.—I am of the same opinion. If the claimant had succeeded in trover, he would have been entitled to the general costs. The only consequence of claiming too much in such an action would have been that the execution creditor might have applied to pay into Court, in which case the claimant would have been on at his peril. The claimant, then, is to have his general costs of the issues and of the applications. The claimant is not entitled to costs.

PATTESON and COLERIDGE Js. concurred.

Rule absolute.

Friday,
May 3rd.

PHELPS and others v. LYLE.

In assumpsit by the directors of a joint stock company, constituted by deed, the deed must be produced, to shew who are the directors; and it is not sufficient to shew that the plaintiffs are the persons acting as directors. A director who has become bankrupt must nevertheless be joined as plaintiff, even although he has ceased to act, unless it be shewn that he has vacated his office.

ASSUMPSIT for not accepting and paying for materials and machinery sold by the plaintiffs to the defendants. Non-assumpsit was the only plea which was material to notice.

At the trial before Lord Denman C. J., at the last sittings after Trinity term, 1837, it appeared that the plaintiffs were directors of "The London United Mining Company," and that the contract declared upon was entered into by a correspondence in 1836 between a Mr. Wainwright, secretary of the Company, and the defendant; Mr. Wainwright in his letters referred to the "Directors" generally as the persons by whom the machinery &c. was to be sold. It appeared that originally there were seven directors, two of them were dead before the alleged contract, and the third had some years previously become bankrupt,

and it was shewn that he has vacated his office.


which time he had ceased to take part, as director, in managing the affairs of the company. It was not shewn, however, that he was actually out of office, and it was proved that he continued to be a shareholder. The remaining four directors were the plaintiffs in this action. The goods, for the price of which the defendant was sued, belonged to the company, which was constituted by a deed of settlement, and consisted of about a hundred shareholders, holding altogether several thousand shares. The deed was not put in evidence. For the defendant it was objected that the correspondence amounted to a negotiation only, but that, if there was a contract, the action should have been brought by all the shareholders of the company, and not by the directors only; and that, even if the directors alone could sue, the bankrupt director should have been a co-plaintiff, as he had not formally vacated office. His lordship overruled the objections, but reserved leave to the defendant to move for a nonsuit.

Sir J. Campbell A. G. in the following Michaelmas term having obtained a rule nisi,

Sir F. Pollock and Swann now shewed cause, and contended that the correspondence amounted to an express contract, so that the plaintiffs, who were the actual parties to it, were entitled to sue upon it.

Sir J. Campbell A. G. and Butt, contra. An action of this kind may be maintained either in the names of the persons with whom the contract was actually made, or in the names of the parties really interested; *Skinner v. Stocks* (a). In this case neither did the shareholders at large sue, who were the parties interested, nor the directors, who were the persons with whom the contract was made, for there was another director, who remained in office, notwithstanding his bankruptcy, and he was not joined. If the constitution of the company enabled the four directors to sue, the deed

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should have been produced; *Dickinson v. Valpy* (a), *Brahmah v. Roberts* (b).

LORD DENMAN C. J. — To put this case in the most favourable point of view for the plaintiffs, the contract was not made with the company at large, but with the plaintiffs as the directors of it. How then was it to be proved that they were such directors, except by means of the deed? It also appeared that there had been another director, who was not made co-plaintiff, and it was not shewn that he had ceased to be a director. The rule for a nonsuit must be absolute.

LITLEDALE J.—A company may undoubtedly invest certain persons, as directors, with authority to manage the affairs of the company, and to sue for them. This company was constituted by deed; and it became necessary to see whether the plaintiffs were directors, and had power to sue, for it would not be enough that they were directors unless they had also power to sue. The deed, therefore should have been produced for this purpose, and also to shew, if such was the fact, that any director becoming bankrupt ceased to be a director, for, in point of law, his bankruptcy of itself would have no such effect.

PATTESON J.—I give no opinion whether there was any contract at all, or, if there was, whether it was made with the company, I will only consider whether the plaintiffs were the directors. Now it is clear that there was another director, who was not shewn to have been removed from office. It is to be assumed then that he continued to be a director; his absence, whether for five days or five years would not vacate his office; nor would his bankruptcy unless provision to that effect were made by the deed. If that were the case it should have been produced.

COLERIDGE J. concurred.

Rule absolute.

(a) 10 B. & C. 128.; S. C. 5 Mann. & R. 126. (b) 3 Bing. N. C. 963

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The QUEEN v. The Mayor of BRIDGNORTH.

Monday,
April 29th.

A RULE had been obtained to shew cause why one or more writ or writs of mandamus should not issue, directed to the defendant, requiring him to insert the name of *Job Allen* and about seventy other persons on the burgess roll of the borough of Bridgnorth.

A single rule for several writs of mandamus is irregular.

The affidavits in support of the rule stated that the parties, on whose behalf the rule was moved, had been expunged from the burgess list at the revision in 1837, on the ground that their rates had not been paid by themselves. It appeared from the affidavits that, on the 30th of August in that year, a resident in the borough had paid all the rates with their knowledge and approbation, except in three cases where the payment had been made without such knowledge or approbation.

The payment of rates under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 9, must be such as may be fairly considered as a payment by the burgess himself, and it is not enough that it has been made with his sanction at the expense of a third party.

R. V. Richards shewed cause, and contended that the mayor had come to a proper conclusion, and that the rates had evidently been paid for the applicants in furtherance of a political object.

Jervis, contra. It is not necessary that the burgess should pay his own rates; *Rex v. Lower Heyford*(a) is a decision upon this point, under the 3 W. & M. c. 11, which confers a settlement upon any person who shall be charged with and pay his share towards the public taxes of the parish. [Lord *Denman*, C. J. That case at all events does not apply where the rates have been paid for a party without his privity.] The 5 & 6 Will. 4, c. 76, s. 9, does not appear to require any actual payment by the burgess himself; the object of the section appears to have been simply to increase the municipal funds. This is effected by rating a burgess, and by giving him a vote, if his rates are paid, as an inducement to him to pay them. If the

(a) 1 B. & Ad. 75.

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payment by a stranger amounts to bribery, there remedy.

LORD DENMAN C. J.—We ought without hesitation say that such a payment of rates cannot be permitted it would manifestly lead to bribery. The act contemns such a mode of payment as may fairly be considered an act of the party rated.

R. V. Richards applied for costs.

Jervis. The point is new, and this practice of paying rates is very prevalent.

LORD DENMAN C. J.—The mayor was quite right in his decision. I say nothing about the number of writs applied for by one rule, as nothing was said about it when the rule was granted. But I think that the mayor is entitled to costs, on the general principle that, when a public officer has decided, as the Court thinks, rightly, it is proper that he should have costs.

LITTLEDALE, J.—I am of the same opinion. The rule for several writs of mandamus must not be made a precedent. There was a case in H. T. 1792(a), in which the Court said that they sometimes granted a rule to inquire into the cause why one or more informations should not be granted, but that they never heard of such a practice with respect to writs of mandamus.

PATTESON and COLERIDGE Js. concurred.

Rule discharged, with costs.

(a) MS. read from a book furnished by Mr. Robinson of the Law Office.



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Monday,
May 6th.

The QUEEN v. CROSSLEY and ROBINSON.

INDICTMENT, charging the defendants as overseers of Todmorden and Walsden, in the county of Lancaster, for not accounting to the auditor of a union, constituted under 4 & 5 Will. 4, c. 76.

1. An indictment stated that the Poor Law Commissioners duly made an order that the auditor of a union should audit the accounts four times every year, viz. within thirty days of Lady-day, Midsummer, Michaelmas and Christmas days, respectively; that a copy of this order, sealed &c., was duly sent to (among others) the defendants, overseers of a township in the union; that it was the duty of the defendants to account to the auditor when the commissioners should order; that the defendants were required by the auditor to account within thirty days of Christmas-day, and

The first count (after stating the due constitution of the union, of which Todmorden and Walsden were parts, the appointment of the guardians, and that the Poor Law Commissioners did, by order under hand and seal &c., amongst other things, direct that the guardians should appoint an auditor of the accounts of the union and of the several townships, and that such auditor should, four times in every year, that is to say, within thirty days of each of the following days, namely, Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, audit the accounts of the union &c., and that a copy of such order was duly sent by them to the clerk of the guardians, and to the overseers of the poor of each of the townships of the union &c., sealed with the seal of the commissioners and duly addressed &c., and that the defendants were overseers at that time, and at the taking of the inquisition, and the appointment of an auditor by the guardians, of which appointment the defendants had notice,) alleged that it was the duty of the defendants, under the provisions of the said act, to render to the said auditor, when and often as the rules and orders of the commissioners should direct, a full and distinct account &c., on behalf of the township of Todmorden and Walsden, and that afterwards, to wit, on &c., within thirty days of Christmas-

refused. Other counts charged the defendants with a breach of duty in not accounting to the auditor when requested by him:—Held, that the indictment was not sustainable under 4 & 5 Will. 4, c. 76, s. 47, as the first count did not allege that the commissioners had made any order that the defendants should account at the specified periods, and as the act does not oblige them to account at the request of the auditor, a breach of which alleged duty was the offence charged in the other counts.

2. The Poor Law Commissioners may be described in an indictment by their style of office.

3. The averment that their order was sent to the defendants is sufficient under the 18th section, personal service of the order not being necessary.

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day, 1838, the defendants were required by the said to account at a certain day, within such thirty days &c., in pursuance of the provisions of the act, but defendants did not nor would account when so required.

The second and third counts did not differ materially from the 1st, and alleged the same duty and breach of duty by the defendants.

The fourth count alleged that the defendants were required by the auditor on the 26th December, 1838, required by the auditor to account on the 2d January following; that they did not account, at the time of the inquisition, for the third quarter; that it was their duty to render such account but they, not regarding their duty, did not at the same time when they were so required, render such account.


The fifth count did not differ from the preceding, except that it omitted the allegation of duty.

The sixth count stated, that for more than a year preceding the time of the offence, the defendants were the overseers of the said township, and thenceforth continued to be such overseers down to the time of the inquisition &c., and that it was their duty to account to the auditor at least in every quarter of a year; that on the 26th December 1838, the auditor requested them to account on the 2d January then next; that they had not at the time of the request accounted for the current quarter, and that the defendants, not regarding their duty, did not nor would account on the said 2d January, when they were so required.

The indictment was tried before Alderson B. at the Liverpool spring assizes, 1839, when a verdict was returned for the crown, subject to a motion to enter the verdict for the defendants on the ground that the auditor had not been legally appointed.

Dundas, on a former day in this term (April 18), refused to enter the verdict accordingly, on grounds which it is not material to this case to mention. He also moved for a new trial, on the ground that the neglect to appoint an auditor was not indictable at all, and that, if indictable,

not properly charged. To shew that the defendants were not amenable to an indictment, but merely to a penalty of 5*l.*, under 4 & 5 *Will.* 4, c. 76, s. 95, he cited *Rex v. Robinson* (a). He objected also that the Poor Law Commissioners not being a corporation should have been described by their names instead of by their style of office, for which he cited *Rex v. Sherrington* (b). He cited *Rex v. Kingston* (c) also, to shew that a copy of the order, under which the auditor was appointed, and a demand in writing to account should have been personally served on each of the defendants. A rule nisi having been granted,

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Starkie and *L. Peel* now shewed cause. 1. This indictment is not framed either on the 95th or 98th sections, which impose a penalty for disobedience to the orders of the guardians or the commissioners, but on the 47th section, which imposes no penalty, so that *Rex v. Robinson* (a) is not an authority for the defendants. That section requires overseers to account once in every quarter, or as often as the commissioners direct. The breach of a duty created by statute was always indictable; this offence, therefore, is not newly created, and, although another section imposes a penalty for the same or a similar offence, the punishment is cumulative; *Rex v. Robinson* (a) is, therefore, an authority against the defendants, and *Rex v. Wyat* (d). [*Patteson J.* It is alleged that it was their duty to account when the orders of the commissioners directed them, and yet it is not stated that the commissioners ever ordered them to account.] The last three counts do not allege the duty in this way. [*Patteson J.* But it is alleged that they did not account when required by the auditor; they do not appear to be bound by the act to account at his request.] 2. The commissioners are properly described, they have a seal of office; the objection is at all events cured by 7 *Geo.* 4, c. 64, s. 20. The last objection, that a copy of the order of

(a) 2 Burr. 799.

(c) 8 East, 41.

(b) 1 Leach, C. C. 513.

(d) 1 Salk. 380.

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the commissioners ought to have been personally served each of the defendants, cannot prevail. Sect. 18 of 4 Will. 4, merely requires that a copy of every order of commissioners shall, before it comes into operation, be sent by post, or in such manner as they shall think fit, addressed to the overseers. The indictment, therefore, is sufficient in this respect.

Kelly, Dundas, and J. P. Cobbett, contra, were called upon by the Court.

LORD DENMAN C. J.—The last objections do not appear to be good, but the indictment cannot be sustained in other respects. There is no count charging the defendants with non-compliance, on the 47th section, for not accounting within a quarter of the year, or with non-compliance with any order of commissioners upon them. The non-compliance with the request of the auditor to account is not an offence under the act.

LITLEDALE J.—The first three counts do not allege that the commissioners ordered the defendants to account, nor is there any sufficient charge against the defendant for not accounting within the quarter. Under the 98th section disobedience to an order of the commissioners is not an offence until the third offence. If the question, therefore, did arise on that section, *Rex v. Robinson* (a) would apply.

PATTESON J.—It is alleged in every count that the defendants neglected to account at the request of the auditor. The 47th section does not require them so to account. The provision that the overseers are to account once in every quarter seems to have been overlooked in drawing this indictment. It is alleged in some of the counts that it was the duty of the defendants to account when ordered by the commissioners, but it is not alleged that they have ordered

(a) 2 Burr. 799.

the defendants to account, so that they cannot be chargeable on that ground. No breach is alleged of any of the provisions of the act.

COLERIDGE J. concurred.

Rule absolute.

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The QUEEN v. The POOR LAW COMMISSIONERS,
in re the CAMBRIDGE UNION.

Monday,
May 6th.

ON the 3d November, 1836, the Poor Law Commissioners made an order that the Guardians of the Cambridge Union, which had been formed under the 4 & 5 Will. 4, c. 76, and consisted of several parishes, should, within one month, appoint one or more fit and proper persons to be the collector or collectors of the poor-rates of such of the several parishes comprised therein as the guardians should deem to require a collector, and should, after such appointments, report the same to the commissioners to approve or disallow the same, and, so often as any person appointed should die or resign or be removed, that the guardians should in like manner proceed to a new appointment. The order also directed that, if the guardians should deem that any one or more of the said parishes should require such services as are usually performed by an assistant overseer, they might appoint the person so appointed as collector for such parish or parishes accordingly; provided that those parishes in which either of the churchwardens or overseers should be willing to collect the rates, should not be deemed to require a collector. It was also directed by the order that the persons appointed under it should, before entering upon the duties of office, give such security for the proper discharge of their duties as should appear necessary to the guardians. The order also specified that the collector should pay over the rates collected to the treasurer of the union, to be placed to the account of the churchwardens

The commissioners for carrying into execution the 4 & 5 Will. 4, c. 76, have no power to direct the guardians of a union, formed under the 36th section, and not being a union for the purpose of rating under the 34th section, to appoint a collector of the poor rates, either for the whole union or any component parish.

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and overseers of the parish on account of which they had been collected: the monies so paid to the credit of the churchwardens and overseers to be applied to the same purposes as they would by law have been applicable to monies collected by the churchwardens and overseers.

In pursuance of the above order the guardians of the union, on the 6th December, 1837, appointed one *W. E. Smith* collector of the poor-rates for the parish of St. Andrew the Less, and the appointment had been confirmed by the commissioners. The inhabitants of this parish notwithstanding, in April, 1838, nominated one *G. W. Brown* assistant overseer, under 59 *Geo. 3*, c. 12, s. 7, and specified amongst his other duties, that he should collect the poor rates of the parish, and he was afterwards, under the provisions of the same act, duly appointed by two justices to the same office. *Smith* continued in office until the 5th December, 1838, when he resigned.

Thesiger (with whom was *Channell*), on affidavits stating the above facts, and that it was believed that the guardians of the union were about to proceed to the election of a collector to succeed *Smith*, moved for a rule to shew cause why a certiorari should not issue to remove the order of the commissioners into this Court, for the purpose of quashing it. The inhabitants of the parish of St. Andrew have appointed an assistant overseer under 59 *Geo. 3*, c. 12, s. 7, and have also, under the powers of that act, specified that it shall be one of his duties to collect the rate of that parish. Unless therefore the 4 & 5 *Will. 4*, c. 76, has repealed the act, the appointment by the parish of a person to collect their rates is good, and the guardians of the union have no authority to appoint any other person to discharge the same duties. Indeed, it will be found that the New Poor Law Act gives no power whatever to guardians either to make or interfere with any poor rate, except where the union is expressly established for the purposes of a common rating under the 34th section. The commissioners could not

authorise the guardians to appoint a collector. By sect. 15, the administration of *relief* to the poor, according to the existing laws, is to be subject to the control of the commissioners, who are to make rules in furtherance of the act. This section, in *Rex v. The Poor Law Commissioners* (a), was thus construed by *Williams J.*—"This section, which is certainly one of the most important ones in the act, seems to me to have for its object only to give power to the commissioners over the actual managers of the poor, in each parish and district, and to have no reference to any *particular* description of managers, or to the mode of their appointment." It may be contended, that the power exercised in this instance by the commissioners is given them by the 46th section, by which it is enacted that the commissioners may "direct the overseers or guardians of any parish or union, or of so many parishes or unions as the said commissioners may in such order specify and declare, to be united for the purpose only of appointing and paying officers, to appoint such paid officers, with such qualifications as the said commissioners shall think necessary, for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing, allowing or disallowing of accounts in such parish or union, or united parishes, and otherwise carrying the provisions of this act into execution," &c. But this section does not authorise the appointment of any officers whom the commissioners may think necessary, but officers for certain duties connected with "the administration of the relief and employment of the poor," matters with which the rate collector would have no concern. And the same section goes on to provide that the salaries of these officers "shall be recoverable against the overseers or guardians of such parish or union, or parishes, by all such ways and means as the salaries of assistant overseers, or other paid officers, of any parish or union, are recoverable by law." This reference to assistant overseers, to whom a salary was payable under the 59 Geo. 3, c. 12, s. 7, shews that act has not been

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(a) 6 A. & E. 1; S. C. 1 N. & P. 371.

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repealed. By the 48th section of the new act the commissioners may remove any assistant overseer or paid officer whom they deem unfit, and require the persons competent in that behalf to appoint a successor. Suppose *Brown*, the assistant overseer, were removed in this case; the overseers of the parish of St. Andrew, and not the guardians of the union, would have to appoint his successor. The new act does not refer in any way to the assessment or the collection of the rate, except where parishes are united under its provisions for the purpose of rating; it applies itself exclusively to the *administration of relief*, that is, to the *expenditure* of the rate, and not to its *collection*. The present question was in fact disposed of by this Court very recently in *Regina v. The Poor Law Commissioners in the matter of the Strand Union (a)*.

Lord DENMAN C. J.—We need not hear you further; you are entitled to a rule.

Rule nisi.

Sir *J. Campbell A. G.*, *Kelly* and *Tomlinson* shewed cause in the first instance. In the case of *The Strand Union (a)* there was a local act under consideration, and no general opinion was expressed by the Court which can govern this case. The appointment of a collector by the guardians is within the clear spirit of the act, which had principally in view increased economy and uniformity in the administration of the poor laws; and the 46th section contains language sufficiently large to authorise the appointment in question. By that section the commissioners may direct the guardians of a union to appoint paid officers to assist in the administration of the relief of the poor. Upon the phrase “relief to the poor,” a very narrow construction has been put in argument, which would, if strictly followed, apply to nothing but the actual transfer of relief from bar

(a) Argued in Mich. term, 1838, and decided at the sittings after last Hilary term. The same question arose then as in the principal

case; and as it involved the consideration of a local act, it has therefore been thought unnecessary to report it.

to hand, and would exclude the appointment of a master of the workhouse. If no rates were collected, there would be no fund from which to administer relief; the connection therefore between the collection of rates and relief to the poor is obvious. But the section goes further still, for it not only authorises the appointment of officers, for the purpose above-mentioned, but also for "otherwise carrying the provisions of the act into execution." [*Patteson J.* Is there a single clause in the act which relates in any way to the collection of the rate?] Perhaps there is not any direct clause; but the power now contended for results from its policy and general provisions. The 46th section enables the commissioners to unite parishes for the exclusive purpose of appointing and paying officers, and they are there required to direct the guardians to appoint paid officers; and the commissioners are thereby also "empowered to define and specify and direct the execution of the respective duties of such officers." By sect. 109, the interpretation clause, "officer" includes *collector* and *assistant overseer*; the commissioners might therefore direct the appointment of a collector or of an assistant overseer. Virtually, therefore, the 59 *Geo. 3*, c. 12, s. 7, as to the appointment of an assistant overseer by the parish, is repealed. It was undoubtedly intended that the commissioners might combine or separate the duties of different offices, according to the qualifications of the parties filling them, or local circumstances, with a view to the more efficient working of the act. It is clear that the legislature did not overlook the 59 *Geo. 3*, c. 12, s. 7, for they adopt its provisions as to the power of defining the duties of the assistant overseer, but that power is transferred to the commissioners, so that an assistant overseer might, if necessary for the purposes of economy, act for several parishes; whereas by the former act, which is clearly, therefore, set aside, he could act for a single parish only. [*Coleridge J.* If the commissioners may direct the appointment of an assistant overseer, it does not follow that he may be employed to collect the rate.

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Patteson J. If the guardians are to appoint a collector, they will have to take security from him, to provide against his misappropriating the money of a *third* party, namely, the churchwardens and overseers. *Coleridge J.* If the money should be lost, the parish would have to be re-rated in consequence of the misconduct of an officer, over whom the parish had no control.] The 48th section, which gives the commissioners power to remove any paid officer whenever, throws light on the 46th section, and shews that all appointments were to be brought within their jurisdiction. The guardians therefore might either appoint a collector, *eo nomine*, under the order of the commissioners, as by the interpretation clause a "collector" is brought within the term "officer" in the 46th section, or they might, under the same authority, appoint an assistant overseer, and then the commissioners, by the same section, might make it part of his duty to collect the rates.

LORD DENMAN C. J.—This appears to me a very clear case. We had occasion lately to look minutely at a former order of the commissioners in the case of *The Stranded Union (a)*, which case came within the same principle as the present. The claim of the commissioners has been made to rest principally on the 46th section, which authorises the commissioners to direct the appointment of such officers as they shall think necessary for a limited purpose, namely, the "administration of the relief, and the employment of the poor." This limitation coming after the general words must be taken to confine them to the provisions of this particular act (the 4 & 5 Will. 4, c. 76,) which abounds in provisions for the due administration of the relief to the poor (properly so called), but is silent on the subject of collecting the poor-rates. One indirect mode of justifying the appointment in question was resorted to. It was said that the commissioners may order the appointment of an assistant overseer for a union consisting of several parishes,

(a) See *ante*, 326, n.

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and may subdivide his office, and prescribe to him the collection of rates. But, if the commissioners were to do that, it appears to me that they would exercise a power which the act does not give them.

LITLEDALE J.—I am of the same opinion. The word “collector” does not occur in the act except in the interpretation clause. The words “paid officers” may certainly in themselves include a collector; but that construction cannot very well be given to them if a collector is not necessary for any of the purposes in the act. The phrase “administration of relief to the poor” seems to contemplate the application of rates after collection. The guardians might perhaps appoint a collector if their union had been formed for the purpose of a common rating, and this may account for the use of the word “officer,” in the interpretation clause, to signify, among other things, a “collector.”

PATTESON J.—The union in the present case was evidently formed under s. 26 of 4 & 5 Will. 4, c. 76, and under that section only. It is not a union for purposes of settlement under the 33rd section, nor for purposes of rating under the 34th, nor for the purpose only of appointing and paying officers, and declared to be so by the order in question, under the 46th section, which latter sort of union, however, I am unable to comprehend.

Taking it then to be a union under the 26th section, the latter words of that section will be found to be very material,—“but, notwithstanding such union and classification, each of the said parishes shall be separately chargeable with and liable to defray the expense of its own poor,”—for they shew that the funds of one parish are in no way to be mixed with those of another by reason of their forming part of the same union.

In support of this order the 15th section is relied on, which makes the administration of relief subject to the control of the commissioners. It is remarkable that, although

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this section enumerates many matters, rating is not of them; and throughout the act no power is given either to the churchwardens or the guardians of any union to interfere with the making or collecting the rates in any parish. There is, true, so far as I can discover, no express reservation in respect, as in *Gilbert's Act* (22 Geo. 3, c. 83), of the existing power of churchwardens and overseers to make and collect the rates, but there is a total omission of any enactments respecting the poor-rates, which cannot have been accidental. The argument in support of the present bill certainly goes too far; for, if the commissioners may direct the appointment of a person to collect the rates, they may also, on the reasoning now employed, direct the appointment of a person to assess them also. The guardians are certainly authorised, by the 23rd and 25th sections, to assess rates, but that is for one particular purpose only, the building and enlargement of union workhouses. The 48th section gives the commissioners power to remove officers, but not to appoint; the commissioners are only to require "the persons competent in that behalf to appoint" (that is, the persons appointing originally,) successors to officers so removed. If it were otherwise, the guardians might complain, and get officers removed for the very purpose of transferring to themselves the right of appointment.

The question then arises, if at all, on the 46th section, by which paid officers may be appointed for certain purposes; and when the legislature has described, however generally, what those purposes are, we cannot stretch the language, and allow such officers to be appointed for other purposes. That section empowers the commissioners to direct overseers or guardians of any parish or union to appoint paid officers for certain purposes. The first purpose is for superintending or assisting the administration of relief and employment of the poor, and it appears to me to be a perversion of these terms to say that they can appoint officers for the collection of rates. Administration of relief is altogether another process from the collection of rates; the

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begins where the other ends. The second purpose is for the examining and auditing, and allowing or disallowing, of accounts in such parish or union, or united parishes. Collecting the rates does not come under that head. Can the guardians then appoint a collector for the other general purposes afterwards referred to, viz. for "otherwise carrying the provisions of *this* act into execution"? Now these words following particular words must be applied to matters ejusdem generis; and, besides, the act contains nothing applicable to collection of rates; collection therefore is not, and cannot be made under the provisions of this act, which studiously, as I have before said, omits all provisions on the subject. The appointment of a paid officer, then, for the purpose of such collection, is not within the powers conferred by the 46th section. In one case, where a union has been formed under the 34th section, for the purpose of rating, the 46th section might authorise the appointment of collector by the guardians of the union, for such an appointment might then be taken as made for carrying that provision of the act into execution. At present I think such an appointment might be good, and, if so, it would satisfy the use of the word "collector" in the interpretation clause, as being one of the persons comprehended by the word "officer" in the body of the act, and so far the act would be consistent. For these reasons I am of opinion that the order in question is illegal.

COLERIDGE J.—I am of the same opinion. We all considered the *Strand Union* case (a) with reference to the general scope of the act; and I for one made up my mind independently of the particular grounds there applicable. It is said that, although there are no particular words in the act, yet that there are general words large enough, to justify *this* appointment of collector. But it appears to me that *there* is no safer mode of construing all these words than *by* considering them with reference to the 15th section, *which* gives the commissioners their power. They are

(a) See *ante*, 326, n.

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there given the control “over the administration of relief to the poor throughout England and Wales;” but that power is subject “to the existing laws:” and we are met by these words, when it is said that the 59 *Geo. 3*, c. 12, is repealed by implication because, (Mr. *Tomlinson* ingeniously contended,) the commissioners may certainly direct the guardians to appoint an assistant overseer for the whole union, and may also impose on him, if they think proper, the duty of collector for the same district; all which, he says, being inconsistent with the 59 *Geo. 3*, c. 12, s. 7, which gives the parish in vestry assembled the power of appointing him and of specifying his duties, must have the effect of virtually repealing it.

But the duties of an assistant-overseer are not limited by that act in like manner as the duties of an overseer are limited by the 43 *Eliz.* c. 2, so that the assistant overseer may have multifarious duties imposed on him. He may, or may not, have to do with the relief of the poor; his powers may be given him *pro re natâ*; so that it does not follow, because the commissioners may direct the appointment of such an officer, that they may, by 4 & 5 *Will. 4*, c. 76, s. 46, assign him the particular duty of collecting the rate, unless that duty is in furtherance of the provisions of this particular act. The argument is also open to this objection, which has been already noticed by my brother *Patteson*, that, if carried out, it would operate as a virtual repeal, to a certain extent, of the 43 *Eliz.* c. 5, for it would justify the commissioners in giving the same officer power with respect to the assessment as well as the collection of rates.

Rule absolute (*a*).

(*a*) By 2 & 3 *Vict.* c. 84, all orders heretofore made by the Poor Law Commissioners, “and not rescinded by them or quashed before the 6th of May in the present

year” (1839), for the appointment of collectors of rates, are declared to have the same force and validity as if the same had been warranted by 4 & 5 *Will. 4*, c. 76.

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Monday,
April 22nd.

WICKHAM v. The QUEEN.

REVERSED on a judgment, against the plaintiff in error, in the Central Criminal Court. The indictment stated, that the defendant contriving and intending to cheat and defraud *Walker* of his monies, on &c., at &c., unlawfully did falsely pretend to *Walker* that he, *Wickham*, was a captain in the service of the East India Company, and that a certain promissory note which *Wickham* then and there produced, and delivered to *Walker*, purporting to be made for the sum of 21*l.*, was a good and valuable security for the sum of 21*l.*; by means of which said false pretences *Wickham* then and there unlawfully &c. and fraudulently obtained from *Walker* 8*l.* 15*s.*, of the monies of the said *Walker*, with intent to cheat and defraud him thereof; whereas *Wickham* was not a captain in the service of the East India Company, and whereas the promissory note which *Wickham* then and there produced and delivered to *Walker* was not a good and valuable security for the sum of 21*l.* or for any other sum of money whatsoever, against the form of the statute, &c. &c.

The principal grounds of error assigned were, that the offence was not alleged with sufficient certainty; that there was no false token alleged or set out; that it was not proved that *Wickham* knew that the promissory note was of no value.

Verdict for the plaintiff in error. No sufficient false pretence is alleged within 7 & 8 *Geo.* 4, c. 29, s. 53. The principle of all the cases decided under this and former statutes is, that the pretence set out must be such as would have been a cheat indictable at common law. The present statute repeals 30 *Geo.* 2, c. 24, and 33 *Hen* 8, c. 1, and the latter statute related to the offences of obtaining

An indictment on 7 & 8 *Geo.* 4, c. 29, s. 53, stated that the prisoner, contriving &c. to cheat *A. B.* falsely pretended to *A. B.* that he was a captain in the East India Company's service, and that a certain promissory note, which he then delivered to *A. B.* was a valuable security for 21*l.*, by means of which false pretences he fraudulently obtained from *A. B.* 8*l.* 15*s.*, whereas the prisoner was not a captain &c., and the note was not a valuable security, &c.—

Held, as it did not appear but that the note was the prisoner's own promissory note, or that he knew it to be worthless, there was no sufficient false pretence in that respect, and, as the two pretences were to be taken together, that

the indictment was bad, and judgment given upon it was reversed in error.

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goods or money by false tokens: but all the statutes made in *pari materiâ*, and whatever has been determined in the construction of one of them is a sound rule of construction for the other, *Rex v. Mason* (a). It is necessary that the false pretence should be ingenious. [Lord Denning C.J. Is a silly person not to be protected?] A person of great imbecility of mind might be imposed upon by an absurd fable, or be terrified by a shadow, but there would not, therefore, be necessarily constituted the offence of frauding by false pretences in the one case, or of the putting in bodily fear in the other. In *Rex v. Jones* (b), it was charged that the defendant came to J. D. and pretended to be sent to him by J. S. to receive 20*l.* for his use, where J. S. did not send him. On motion to quash the indictment, Holt C. J., said: "It is no crime unless he came with false tokens. Shall we indict one man for making a false token of another? Let him bring his action." To constitute a false pretence there must be a false token, or a conspiracy or the guarantee of a third name resorted to: *Rex v. Whalley* (c), and *Rex v. Lara* (d). A false pretence under this statute must be of the same nature as a cheat, indictable at common law, except that the false pretence need not be such a cheat as concerns the public at large. In the last cited value was obtained by a man giving his cheque upon a banker, which was worthless; yet it was held that there was no false pretence, although where a cheque is given to a third person is introduced, so that that is more like a false token than the present case, where the prisoner gave his own promissory note. [Coleridge J. It is not alleged to be his own note.] It does not appear to have been the note of another person, and, if it was so, the prisoner might innocently have sold it for 8*l.* 15*s.*, as the securities of persons in doubtful credit are often sold at an under price. But, if it was the prisoner's own note, then all that is char


(a) 2 T. R. 581.

(b) 2 Ld. Raym. 1013.

(c) 2 Burr. 1125.

(d) 6 T. R. 565.

is, that he did not keep his promise. It is true that it is also charged that the prisoner pretended to be a captain in the East India Company's service, and it is averred that he was not so, but it is not averred that he was not in the service at all, or that he was not an officer of even higher rank than a captain. The two pretences are to be taken together, and the note should have been set out. He cited also *Rex v. Mackarty* (a), *Rex v. Codrington* (b), *Rex v. Flint* (c), *Rex v. Spencer* (d), and *Rex v. Perrott* (e). In *Young v. The King* (f), and *Count Villeneuve's case* there cited, the name of a third person was introduced. Here the money might, without the misrepresentation of any fact, have been obtained on the prisoner's own promissory note, which it is not even charged that he knew to be worthless. [Lord Denman C. J. Do you think, Sir F. Pollock, the indictment can be maintained?]

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Sir F. Pollock, *contra*. It is admitted that the only false pretence to be relied on is, that the prisoner assumed a false character. [Lord Denman C. J. The two false pretences are put together.] It must be presumed that the judge directed the jury to lay the invalid pretence out of consideration. [Patteson J. The pretence that is false must have been the operative one, which is matter of evidence.] *Rex v. Story* (g), was a case like the present; the prisoner there assumed the name of another person, and the indictment was held good. [Coleridge J. But there the indictment charged that the money was obtained by that pretence only.]

LORD DENMAN C. J.—I do not mean to throw any doubt on late decisions, nor do I agree in much that has been advanced in argument, but I am of opinion that the two pretences in this indictment must be taken together, and,

(a) 2 *Ld. Raym.* 1179.

(b) 1 *C. & P.* 661.

(c) *Russ. & Ry.* 460.

(d) 3 *C. & P.* 420.

(e) 2 *Mau. & Sel.* 379.

(f) 3 *T. R.* 98.

(g) *Russ. & Ry.* 81.

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as the pretence charged with respect to the promissory note, which it is not even stated that the prisoner knew to be worthless, is insufficient, the indictment is not sustainable, and the judgment upon it must be reversed.

LITLEDALE J.—Both pretences must be taken together; the money might, perhaps, not have been obtained merely by the assumption of a false character.

PATTESON J.—As it is consistent with the indictment that it was the prisoner's own note which he produced, the assumption of character makes it probable that this was all one pretence. If it had been the note of another person I might have doubted. I think the indictment bad.

COLERIDGE J. concurred.

Judgment reversed.

Wednesday,
May 8th.

HOLLAND and another, Assignees &c. v. PHILLIPPS.


The plaintiffs, who had been chosen assignees of a bankrupt, issued a scire facias to revive a judgment obtained by him before bankruptcy against the defendant, but omitted to make the official assignee a co-plaintiff.

The Court, after plea pleaded and

issue joined, allowed the proceedings to be amended by joining the official assignee and held also, that in cases of such amendment the opposite party should always be allowed to plead de novo.

IN this case the plaintiffs, who had been chosen assignees of one *Hayward*, a bankrupt, had, after the appointment of the official assignee, issued a scire facias for the purpose of reviving a judgment obtained against the defendant by the bankrupt before bankruptcy, but had omitted to join the official assignee as co-plaintiff. The defendant had pleaded, that *Hayward* was not a bankrupt, and payment to the bankrupt before bankruptcy, and had given notice to dispute the trading, act of bankruptcy, and petitioning creditor's debt. After issue joined, a rule nisi was obtained by the plaintiffs to amend the proceedings, by adding the name of the official assignee.

M. Smith shewed cause. The proceedings in this case are after judgment, and there is nothing to amend by. In *Thorpe v. Hook* (a) the proceedings were amended, but in that case, and in the cases there relied upon in support of the amendment, there was something to amend by, and the judgment proceeded on that ground. In *Baker v. Neaver* (b) the Court allowed a declaration to be amended by adding the name of the official assignee as plaintiff in an action brought by the assignees of a bankrupt, but it does not appear that the defendant had pleaded, and it was not a case of *scire facias*, so that the whole proceedings were in paper. The general rule is, that a *scire facias* is not amendable, and this is not *scire facias* of an original character, as against bail, but is a continuation of former proceedings.

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Sir *J. Campbell* A. G., contra. The grounds of judgment in *Baker v. Neaver* (b) warrant the amendment now applied for; the official assignee is by statute to be one of the bankrupt's assignees in all cases, and, unless the defendant has defended this action on the ground that the official assignee was not joined, there is no reason for refusing this application, which is for an amendment that might be made at common law, and is within the Statute of Jeofails, (14 *Edw.* 3, st. 1, c. 6). The present proceedings are all in paper, for a *scire facias* is in the nature of a fresh action, and partakes of all the incidents of an ordinary declaration. In *Rex v. Scott* (c) a *scire facias* was amended after the defendants had pleaded. The amendment will make no substantial change of parties; all the assignees together represent the bankrupt.

Lord DENMAN C. J.—We think that this amendment ought to be allowed, on payment of costs.

M. Smith then applied for leave to plead de novo.

(a) 1 Dowl. P. C. 501.

(c) 4 Price, 181.

(b) 1 C. & M. 112.

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Sir *J. Campbell* A. G. opposed the application.

Lord DENMAN C. J.—We think it ought to be a universal condition of such amendments, that the adverse party should be allowed to plead *de novo*.

LITTLEDALE, PATTESON and COLERIDGE Js. concurred.

Rule absolute on payment of costs.

Wednesday,
May 8th.

SOLARI v. YORSTON.

A warrant of attorney for a sum above 50*l.* requires a 1*l.* 10*s.* stamp, although one of two parties giving it was in custody at the time of its execution, and if it has a 1*l.* stamp only, it cannot be enforced by judgment even against him singly, although it is a joint and several warrant.

IN this case the defendant was taken under a *capias ad satisfaciendum*, issued the 1st August, 1838, on a judgment obtained by the plaintiff against the defendant, in an action on a bill of exchange for 30*l.*, drawn by one *Wright* and indorsed to the defendant, and by him indorsed to the plaintiff. An arrangement was then made, in pursuance of which the defendant and *Wright*, the drawer of the bill, executed a joint and several warrant of attorney to the plaintiff, to enter up judgment in the penal sum of 100*l.*, to be defeated on payment of 52*l.* 15*s.* 10*d.*, the amount of the bill and costs in the action. The defendant was then liberated. Afterwards, the amount not having been paid, judgment was signed against both *Wright* and the defendant. The former was taken in execution in February, 1839, and subsequently obtained his discharge under the Insolvent Acts. The defendant was taken in March following on the same judgment, and remained in custody until the 3d April, when he was discharged by a judge at chambers, on the ground that the warrant, which had a 1*l.* stamp, was not sufficiently stamped, as it was given to secure a sum exceeding 50*l.*, and therefore by 55 *Geo.* 3, c. 184, Sched., ought to have had a 1*l.* 10*s.* stamp, as *Wright* was not in custody at the time of its execution, so as to bring the case within the ex-

ception in the act. After the defendant's discharge the plaintiff signed judgment against the defendant only, under which he was taken again on the 9th April. The case was again brought before a learned judge at chambers, and referred to the full Court.

W. H. Watson having accordingly obtained a rule nisi for setting aside the judgment for irregularity, with costs, and discharging the defendant out of custody,

Alexander now shewed cause. A warrant of attorney requires, under 55 *Geo. 3*, c. 184, Sched., the same stamp as a bond for the same amount, which in this case is a 1*l.* 10*s.* stamp, but, where the warrant is given to secure a sum for which the person giving the same shall be in custody under an arrest, then the stamp is only 1*l.*, which has been affixed in this case. The defendant was in custody when he executed the warrant of attorney, so that it is good against him: if *Wright* should hereafter object, the warrant might fail, for it would then have discharged its duty. The warrant in terms authorizes judgment to be entered up against either party separately; the present judgment is against the defendant alone, and, as the warrant is good against him, the judgment is valid. An instrument relative to many parties may be properly stamped as against the first objector, though it would not serve in more than one instance. In *Perry v. Bouchier* (a) the defendant called the master of his vessel to disprove negligence, and gave him a release, which appeared to be a release not only to the master but to three others, and had only one stamp; Lord *Ellenborough* held that the release was sufficiently stamped as related to the master, who was the first person named in it. *Doe d. Copley v. Day* (b) is also an authority to the same effect.

LORD DENMAN C. J.—The stamp is insufficient. This

(a) 4 Camp. 80.

(b) 13 East, 241.

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rule must be absolute, the defendant undertaking to bring no action.

LITLEDAL and PATTESON Js. concurred.

Rule absolute.

Saturday,
April 20th.

NEWMAN v. BENDYSHE and another.

A conviction under 11 *Geo.* 4 and 1 *Will.* 4, c. 64, and 4 & 5 *Will.* 4, c. 85, for keeping a house open for the sale of beer, and selling beer, and suffering it to be drunk on the premises, at a time of day prohibited by an order of justices, and fining the party charged in a single penalty for "the offence aforesaid," is bad, as it charges three distinct offences.

TRESPASS by the plaintiff, who was licensed to sell beer to be drunk on his premises, against the defendants, who were magistrates for the county of Cambridge, for causing his goods to be taken as a distress, under a conviction for an alleged offence against the beer acts.

At the trial before *Tindal* C.J., at the Cambridgeshire spring assizes in this year, it appeared that the conviction stated that the plaintiff, on a certain day, "did keep open his said house for the sale of beer, and did sell beer, and did suffer and permit the same to be drunk and consumed on his premises between the hours of nine and ten o'clock in the evening," the same having been declared to be unlawful by a certain order of justices, assembled in special sessions in pursuance of the statute, &c., by which the said justices fixed the hours at which houses licensed to sell beer within their district should be closed, namely, at nine in the evening. The conviction stated also that the plaintiff was fined forty shillings for "the offence aforesaid." The question at the trial turned on the validity of the above conviction, to which several objections were made. His lordship directed a verdict for the plaintiff, and reserved leave to the defendants to move for a nonsuit.

Kelly, on a former day (*a*) in this term, moved accordingly. Seven objections were made to the plaintiff's conviction: it is admitted that if any one of them can be sustained the verdict in his favour must stand. The 11 *Geo.* 4 and 1 *Will.* 4, c. 64,

(*a*) Before Lord *Denman* C.J., *Littledale*, *Patteson* and *Coleridge* Js.

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s. 14, enacts that no person licensed to sell beer by retail "shall have or keep his house open for the sale of beer, nor shall sell or retail beer, nor shall suffer any beer to be drunk or consumed in or at such house," at the times therein specified, and imposes a penalty of forty shillings for every offence, and every separate sale is to be deemed a separate offence; and the 4 & 5 Will. 4, c. 84, (which by sect. 11 incorporates all the powers and penalties of the preceding act,) enacts, in sect. 6, that the justices in petty sessions assembled shall fix the hours at which houses so licensed shall be opened and closed. The objections taken to this conviction were—1, That the name of the person to whom the beer was sold is not stated in it. But there is nothing in 11 Geo. 4 and 1 Will. 4, c. 64, s. 14, which requires such particularity; any sale whatever at a prohibited time is an offence. 2. That the order of justices, fixing the hours to be observed by the licensed houses, is not sufficiently set out, and that the names of the justices who made it are not given. This objection cannot be sustained, for the order is sufficiently set out to shew that the plaintiff offended by keeping his house open at a prohibited time, and the act does not require the names of the justices to be given. [*Patterson J.* By 4 & 5 Will. 4, c. 85, s. 6, a party aggrieved by any such order may appeal, giving to the justices who made it fourteen days' notice of his intention. He would have difficulty in learning their names if they are not given.] 3. That the conviction alleges that the order of justices declared the selling, &c. at the hour specified was unlawful, and that the statutes do not empower them to make such a declaration. If that be so, the declaration was mere surplusage. 4. That the order is stated to have been made at *special* instead of *petty* sessions. But any two justices meeting in the same place constitute a petty session: *Reg. v. Rawlins (a)*; in which case a very similar objection was taken. 5. That the charge that the plaintiff did the prohibited acts between the hours of nine and ten is insufficient.

(a) 8 C. & P. 339.

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The time, however, is stated with sufficient certainty necessarily appears to have been after nine, which time prohibited by the order. 6. That the order have been set out in hæc verba. This objection already noticed. 7. That it is a conviction of the defendant for three offences, viz. keeping his house open for the sale of beer, selling beer, and suffering it to be drunk on the premises. In *Rex v. Salomons* (a) (which was cited in *trial*), a conviction under the Lottery Act (22 Geo. 3. c. 24) for dealing in shares of lottery tickets, and registering the same without license, was held bad, because it contained three distinct offences. But there the acts done were in themselves distinct, and could be done at distinct times. [Lord Denman C. J. A person might keep his house open for the sale of beer, and he might sell beer without keeping his house open.] The keeping a house open must be for the purpose of carrying on the business of the house, and if the beer sold to a person on the premises at a particular time were then and there drunk by him, that would be a single act, as far as the plaintiff was concerned, and at a single moment of time. The 11 Geo. 4. c. 64, s. 27, says that no conviction under that act shall be quashed for want of form.

Cur. adv. sol.

LORD DENMAN C. J. now stated that the Court were of opinion that the conviction could not be sustained on the ground that the defendant was charged with three offences; so that the party convicted could not be able to protect himself by it, if a fresh indictment should be laid against him for any one of the same.

Rule refused.

(a) 1 T. R. 249.

(b) See *Newman v. Earwicke*, 3 N. & P. 368.

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Saturday,
April 27th.

MATTOCK, Executor of SOUTHWOOD, v. KINGLAKE.

DEBT. The declaration stated that, before the making of the articles of agreement hereinafter mentioned, the defendant was trustee in fee for *Southwood*, his heirs and assigns, of certain hereditaments, (to wit, by virtue of an indenture of bargain and sale before made, &c. by *A. B.* to *Southwood* (a),) to such uses &c. as *Southwood* should appoint by any deed &c., and in default thereof to the use of the defendant in fee, in trust for *Southwood* in fee. That, the defendant being so seised in trust for *Southwood*, by a certain deed dated August, 1822, *Southwood* agreed to sell and the defendant agreed to purchase the said hereditaments. And the defendant did thereby covenant and agree to pay to *Southwood*, on or before the 19th February, 1825, as the consideration of such sale and purchase, the sum of 11,206*l.*, with interest for the same at the rate of 5 per cent. per annum, payable half-yearly, from the 19th February then last past, to the time of the completion of the said purchase, *Southwood* allowing thereout the same rate of interest for so much of the purchase-money as might be paid to him in the mean time; and the defendant thereby also agreed to pay for the conveyance and the stamp-duty for the same. Averment, that, although *Southwood* in his lifetime was willing &c. and did, on the day and year last aforesaid, offer to execute a conveyance to the defendant of the said hereditaments; and although defendant, from the making of the said agreement hitherto, had been in possession &c., yet defendant did not pay to *Southwood*, in his lifetime, or to the plaintiff, executor, since his decease, the sum of 4238*l.*, parcel of the principal of the purchase-money, with interest, from the said 19th February, 1822, to the said 19th February, 1825, although the purchase, through the mere default of the defendant, had not been completed before that day.

On an agreement for the sale of lands, the defendant covenanted to pay the purchase-money on a day certain, for and as the consideration of such sale and purchase, with interest, from a day certain to the time of "the completion of the purchase:"—Held, that the covenant by the defendant was an independent covenant, and that the vendor might recover the purchase-money without tendering a conveyance.

(a) Sic. The use therefore appears to have been executed in *S.*, and defendant could not have been trustee in fee.

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Plea: that *Southwood* did not at any time tender to defendant any conveyance of the hereditaments. General demurrer and joinder.

Bere, in support of the demurrer. It was no part of *Southwood's* duty to tender a conveyance. The defendant was bound by express covenant to pay for the conveyance and the stamp; it was his duty therefore to prepare the conveyance; *Price v. Williams* (a), and 1 *Sugd. V. & P.* 247, (9th ed.) citing *Seward v. Willock* (b). But even if this duty had been cast upon *Southwood*, as the vendor, the conveyance was not a condition precedent to the recovery of the purchase-money. By the agreement a positive day was fixed for payment of the purchase-money, and interest was payable also from a day certain, whereas no time is fixed for executing the conveyance. It is clear, therefore, that the purchaser relied on his remedy, and not on a tender of the conveyance, to secure the equivalent for his purchase money; and the acts to be done by the respective parties were not concurrent and independent acts, so that the vendor might recover the purchase-money without previous tender of the conveyance; *Thorp v. Thorp* (c), *Terry v. Duntze* (d), *Pordage v. Cole* (e) and note 4.

Manning, contra. The authorities cited in the note to *Pordage v. Cole* (e) are not disputed, but they do not apply to the contract stated in the declaration. The purchase-money in this case was to be paid "in consideration of such sale and purchase;" that shews of itself that the two acts were meant to be concurrent. It was also to be paid on 19th February, 1825, and interest was to be payable from February 1822, "to the time of the completion of the purchase." The completion of the purchase means evidently the completion of the conveyance, which therefore was to be made on the same day (19th February, 1825) or

(a) 1 M. & W. 6.

(b) 5 East, 198.

(c) 12 Mod. 455.

(d) 2 H. Bl. 389.

(e) 1 Wms. Saund. 319 h.

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which the purchase-money was to be paid. It was not the duty of the purchaser, whom the law presumes to be a stranger to the title, to prepare the conveyance; the conveying party is to prepare it in all cases (a). Where it is the duty of the purchaser to prepare it, on his neglecting to do so, the vendor may either bring an action for the breach of covenant, or file a bill to compel specific performance; but he cannot bring debt for the purchase-money; otherwise he might get the price of the land, without giving possession of it. Many of the old cases, in which covenants like the present have been held to be independent covenants, have been overruled; *Goodisson v. Nunn* (b), *Glazebrook v. Woodrow* (c). [*Patteson* J. In those cases the covenants on either side were to be performed on the same day.] He cited also *Gibson v. Patterson* (d), *Pincke v. Curteis* (e), *Seton v. Slade* (f), *Harnett v. Yielding* (g), *Flint v. Brandon* (h), and *Halsey v. Grant* (i), to shew that the jurisdiction of courts of equity to enforce specific performance against a purchaser is founded upon the inability of the vendor to recover the purchase-money in a court of law, until he has actually vested the legal estate in the purchaser.

LORD DENMAN C. J.—I am of opinion that the covenants to be performed by the parties to the contract declared on were not concurrent covenants. The particular circumstances which have been relied on in the present contract, do not take it out of the principle to be derived from *Pordage v. Cole* (k), and the notes to that case. If Mr. Bere is right, that the defendant had to tender the conveyance, he had the remedy in his own hands. This is the case of an agreement by the defendant to pay money on a day certain,

(a) 6 Taunt. 561.

(b) 4 T. R. 761.

(c) 8 T. R. 366.

(d) 1 Atk. 12.

(e) 4 Bro. C. C. 329.

(f) 7 Ves. 265.

(g) 2 Schoales & Lef. 549.

(h) 8 Ves. 159.

(i) 13 Ves. 73.

(k) 1 Wms. Saund. 319 b.

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and he has not chosen to have any certain day fixed for the execution of the conveyance.

LITLEDALE J.—The defendant contracts to pay money on a particular day. It is true that he does so contract in consideration of the sale and purchase, and that, generally speaking, where one act is to be done in consideration of another, performance must be averred by the party who sues on the agreement. But there is a distinction where a day is fixed for doing one of the acts, and not for doing the other; in such a case the acts need not be done concurrently, and the party who has fixed no time for receiving the consideration for his own act, is taken to have relied on his remedy, in case the consideration fails, and not to have intended that the performance of such consideration should be a condition precedent; *Callonel v. Briggs* (a), and *Pordage v. Cole* (b). In *Goodisson v. Nunn* (c), and *Glazebrook v. Woodrow* (d), the two acts were to be performed on the same day. The two acts under this contract were not required to be done on the same day; the covenants to perform the acts were independent covenants, and if the defendant had sued *Southwood* shortly after the making of the contract for any refusal to convey the estate, the action might have been maintained, although the purchase-money had not been paid.

PATTESON J.—*Pordage v. Cole* (b) is directly in point. There are but two states of circumstances under which it is necessary that the vendor should aver a tender of conveyance, viz. where by the terms of the contract the conveyance is to be made either before or at the time when the money is to be paid. This agreement does not state when the conveyance was to be made, nor is it necessary to a right construction of it to say that it was to be made at the same time when the money was to be paid. The words requiring

(a) 1 Salk. 113.

(b) 1 Wms. Saund. 319 h.

(c) 4 T. R. 761.

(d) 8 T. R. 366.

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interest to be paid to the completion of the purchase, refer, in my opinion, to completing the payment of the purchase-money, and not to making the conveyance. A certain day was fixed for payment of the purchase-money, and the effect of the words making the interest payable up to "the completion of the purchase" is to stop interest, in case of the payment of the principal before that day.

COLERIDGE J.—I am of the same opinion. The intention of the parties, as expressed in their contract, must govern its interpretation. The rule deduced from the old cases by Serjt. *Williams*, in his note to *Pordage v. Cole* (a), is a sound one. In that part of the agreement which relates to the sale generally, nothing whatever is said about the time for doing any act to be done by the vendor. In the second part of the agreement, which relates to the purchase-money, the terms are most specific as to time. The principal sum is to be paid on a day certain, and interest is to run from a day certain to "the completion of the purchase." I do not think these words have the meaning put upon them by Mr. *Manning*. I think the defendant might, if he pleased, have paid the money immediately after making the contract, in which case no interest would have been payable. If he might have done so, it shews that the time of payment was altogether independent of the time of conveyance.

Judgment for the plaintiff (b).

(a) 1 Wms. Saund. 319 b.

(b) In the course of the argument in this case it was contended for the plaintiff that, the legal estate having vested in the defendant under the indenture of bargain and sale, and the equitable estate having also vested in him under the articles of agreement, which were a good execution of

the power, no conveyance was necessary to complete the defendant's title. To this it was answered that by the Statute of Uses the legal estate, under the indenture, vested in S., and that the defendant was entitled to a conveyance, containing covenants against incumbrances and a release from the purchase-money.

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The QUEEN v. The MAYOR of EYE (a).

1. The Court will make absolute a rule for a mandamus to insert a name on the burgess roll, under 11 Will. 4 and 1 Vict. c. 78, s. 24, although the year for which such burgess roll was made out has expired since the granting of the rule nisi, and the mayor is dead to whom the rule was directed. Such a writ is not peremptory in the first instance.

2. A person rated for the whole of a house, which he occupies, with the exception of one room, underlet by the week, has a sufficient occupation to entitle him to be on the burgess roll, under 5 & 6 Will. 4, c. 76, s. 9.

3. So also where one

house adjoined another, both being under the same roof, and having a common entrance passage, into which the outer door of each opened, and a common staircase leading to the bed-rooms; each house is distinct, and may be the subject of a sufficient occupation under the last-mentioned statute.

4. But where a person let a cellar, under the house for which he was rated, to a person who occupied it as a warehouse, and was rated for it, there being an internal communication between the house and cellar, the occupier of the house is not qualified to be on the burgess roll.

5. The occupier of a house, who had assigned all his stock in trade and book debts to a creditor, is, nevertheless, qualified to be on the burgess roll.

IN Michaelmas term, 1837, four rules nisi had been obtained for writs of mandamus, commanding the defendant to insert the names of *Neobard*, *Ungless*, *Lait*, and *Evans*, upon the burgess roll of the borough of Eye. The claims of the several applicants rested on distinct grounds, arising out of the 5 & 6 Will. 4, c. 76.

In *Neobard's* case, it appeared that he had rented a house in the borough for three years previously to August, 1837, had been duly rated in respect thereof, and had paid the rates. He occupied all the house except one room, which he let to a lodger at 1s. 6d. a week. The room communicated with the rest of the house; the lodger was removeable at any time on a week's notice, and did not sleep on the premises. At the revision of the burgess lists the claimant's name was expunged, on the ground that his occupation was insufficient.

B. Andrews and *Byles* now shewed cause, and took preliminary objections to the rule; that the roll on which it was sought to insert the claimant's name was no longer in force; that the mayor, to whom the rule nisi was directed, had since died; that the case had been decided at the Revision Court, and that this Court would not interfere, as the mandamus under 11 Will. 4 and 1 Vict. c. 78, s. 24, was peremptory in the first instance, the Court, and not a jury, having to inquire into the title of the applicants.

(a) Decided in Hilary term last, January 28th.

The COURT overruled the preliminary objections, and stated that the mandamus in these cases would not be peremptory, but would follow the usual course.

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B. Andrews and *Byles*. The name was properly expunged. The 5 & 6 Will. 4, c. 76, s. 9, says that every male person who "shall have occupied any house, warehouse, counting-house, or shop, within any borough," &c., shall be a burgess. The word "occupy" occurs also in 1 Will. 4, c. 18, under which it has been held that, for the purpose of gaining a settlement, the whole house must be exclusively occupied by the pauper: *Rex v. St. Nicholas, Rochester* (a).

F. N. Rogers, contra. That statute requires *actual* occupation, and the case cited was decided on that ground; and under the prior statutes, on the same subject, requiring that the pauper should simply "occupy," it was held that a pauper might gain a settlement by occupying a tenement, part of which he had underlet: *Rex v. Ditchet* (b) and *Rex v. Great Bentley* (c). In *Fludier v. Lombe* (d), where persons were householders of houses above the value of 10*l.* a year, and paid scot and lot, but had let part to lodgers, and thereby reduced their rents to be under 10*l.* a year, it was held that they were the sole occupiers of the houses, and entitled to vote, under 11 Geo. 1, c. 18, for the election of common councilmen for the city of London. *Phillips' case* (e) and *Duigenan's case* (f) are similar decisions by the Irish judges with respect to the occupation necessary under the Irish Parliamentary Reform Act.

LORD DENMAN C. J.—We think that the party was entitled to vote, and that his name should be inserted on the burgess roll.

(a) 5 B. & Ad. 219; S.C. 3 N. & M. 21.

(c) 10 B. & C. 520; S.C. 5 M. & R. 520.

(b) 9 B. & C. 176; S.C. 4 M. & R. 151.

(d) Ca. temp. Hardw. 307.

(e) Alcock's Reg. Cases, 20.

(f) Ibid. 114.

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WILLIAMS and COLERIDGE Js. (a) concurred.

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Rule absolute.

In *Ungless's case* it appeared that the applicant was the rated occupier of a house within the borough, and that he had paid his rates. For two years before August, 1837, he had let off, to his son, a cellar underneath the house. The son used the cellar as a warehouse, and was rated for it. There was an internal communication between the cellar and the rest of the house. The applicant's name had been expunged on the ground that his occupation was not sufficient, and that he was not rated for the cellar.

B. Andrews and *Byles* shewed cause, and contended that, as the part of the house underlet was used by the son as a warehouse and as he was rated for it, the father could not be said to occupy the whole house.

F. N. Rogers, contra. The cellar was a distinct subject of occupation. Suppose the occupier of a house to let off a stable, communicating with it by means of a covered way, would he be the less the occupier of the house? [*Coleridge J.* Would it make any difference if the cellar was occupied as a dwelling-house, or if the party took his meals in the stable?] It would seem not. *Rex v. Great and Little Usworth* (b) shews there would be a distinct dwelling-house in either case. [*Coleridge J.* If the ground floor were let off as a shop to one person, and the first floor as a warehouse to another person,—would the rest of the house be sufficient to give a qualification within the act?] It would.

Lord DENMAN C. J.—I cannot say, in this case, that there was a distinct holding, as there was an internal com-

(a) *Littledale J.* had left the Court during the argument.

(b) 5 A. & E. 261; S. C. 6 N. & M. 811.

munication between the cellar and the rest of the premises. If we were to decide in favour of such an occupation, it would greatly encourage the splitting of votes.

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LITTLEDALE, WILLIAMS and COLERIDGE, Js. concurred.

Rule discharged.

In *Lait's case*, the applicant occupied a house in the borough, for which he had been duly rated, and had paid his rates. In his affidavit he stated that he admitted on his examination that he had executed a bill of sale of all his personal estate, as security for a debt, but that the deed had never been out of his possession or acted upon: according to the affidavits in opposition, he stated that it had been destroyed. His name had been expunged from the burgess list, on the ground that he was not in the occupation of his house, and that his rates were paid out of personal property, which did not really belong to him. The deed was set out by the applicant, and contained an assignment of his stock in trade, book debts, &c., but not of his house.

B. Andrews and *Byles* shewed cause.

The COURT (without hearing *F. N. Rogers* on the other side) held that the bill of sale did not invalidate the applicant's occupation, and that the rule should be made absolute.

Rule absolute.

In *Erans's case*, the applicant described his premises as a house joining another house, which had been unoccupied for three years, and was under the same roof with it. There was a common entrance to the houses by means of a passage, and their doors opened into it right and left. There was also a common staircase leading to the sleeping rooms of the respective houses. The affidavits in answer alleged

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that the applicant on his examination stated that he did not occupy a whole house, and that he described the passage as an internal communication and thoroughfare passage between the two parts of the house. His name had been expunged on the ground that he did not occupy the whole of a house.

B. Andrews and *Byles* shewed cause.

F. N. Rogers, contra, cited *Kitchin* on Courts, Inmate 92, and *Rex v. Bailey* (a).

Per CURIAM—

Rule absolute.

(a) *Moody*, C. C. 23.



MEMORANDUM.

In this term, *Peregrine Dealtry*, Esq., was appointed by writ of privy seal Queen's Coroner and Attorney in the Court, in the place of *Edmund Henry Lushington*, Esq.—deceased.

END OF EASTER TERM.

TRINITY TERM,

IN THE SECOND YEAR OF THE REIGN OF VICTORIA, 1839.

The Judges in Banc this Term were,
 Lord DENMAN C. J. PATTESON J.
 LITTLEDALE J. WILLIAMS J.

In the Bail Court,
 COLERIDGE J.

NORRIS v. SMITH.

Thursday,
 May 23rd.

THIS was an action for a libel, charging the plaintiff with keeping a house of ill fame. Pleas; 1, not guilty; 2, justification.

At the trial before Lord *Denman* C. J., in Middlesex, at the sittings after last term, it appeared that the defendant was the clerk to the trustees for paving and lighting the parish of St. Luke, Middlesex, under the 50 *Geo.* 3, c. cxlix. (local and personal,) and that the libel in question was contained in a written notice served on the plaintiff, stating that complaint had been made to the trustees that the plaintiff kept a house of ill fame, to the nuisance of all the liege subjects, &c., and requiring the plaintiff to abate the said nuisance, and signed by the defendant as clerk, by order of the trustees. The plaintiff, after proving service of the notice, put in the following letter, addressed to the defendant by the plaintiff's solicitor:—

“ 35, Castle Street, Holborn, 4th August, 1838.

Sir,—I am directed by Mr. *John Norris*, of President Street, to request you will forthwith give up the names of the person or persons

the action would be commenced at the expiration of the number of days mentioned in the act.

2. The trustees were authorized to abate any hogstye, necessary house, or nuisance in the parish, on complaint of any inhabitant:—Held, that, whether a brothel be a nuisance within the meaning of this provision or not, if the trustees took steps to put down such a house bonâ fide, they were entitled to notice of action.

1. Where trustees of a lighting and paving act were entitled to a certain number of days' notice of action, for any thing done in pursuance of the act, a notice that, unless the name of the party on whose information they had taken certain steps were given up, proceedings would be taken against them, was held bad, because it was conditional, and also, per *Patteson J.*, because it should have specified that

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said to have made a complaint to the trustees for lighting, &c. of St. Luke, and upon which you did, on the 23d day of July. Mr. *Norris* with a notice, charging him with keeping a disorder &c.; unless you do, Mr. *Norris* will consider you the author of the notice, (which I conceive to be libellous,) and will take proceedings against you accordingly."

The defendant wrote the following reply:—

" 6th August

Sir,—In answer to yours of the 4th inst. I beg to say that I am happy to receive any proceedings which Mr. *Norris* may, on my advice, think fit to take against me in reference to the notice given to him by you."

The plaintiff also proved that he had applied to the trustees for the name of any party who had given information to the board against the plaintiff, in order to take proceedings against him, but the trustees refused to give the name.

The defendant relied on sect. 105 of the local act enacted "that in case in any part of the said parishes a hogstye, necessary house, or nuisance, should be in any of the streets, squares, ways, &c. within the said parishes it should be lawful for the said trustees, upon complaint thereof to them made by any such inhabitant, and after investigation of such complaint, by notice in writing under the hand of their clerk for the time being, to order every such nuisance should be forthwith remedied or removed;" and empowered them, if the nuisance was not removed within seven days after notice to the owner of the premises, to indict him at the quarter sessions. Sect. 106 enacted that no plaintiff should recover in any action commenced against any person, for any thing done in pursuance of the act, unless notice of such action should have been given to the clerk of the trustees twenty-one days before such action should be commenced, specifying the cause of action. Sect. 173 enacted that no action should be commenced against any person, for any thing done in pursuance of that act, until after thirty (a) days' notice in writing to the clerk of the trustees.

(a) *Sic.*

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The defendant, after proving that one of the trustees had reported to the board that the plaintiff's house was a brothel, and that, the matter having been referred to a committee of the trustees, they had visited the house, and afterwards directed the defendant to give the notice in question, relied on the above sections requiring a notice of action.

The plaintiff contended that the words of sect. 105, empowering the trustees to abate a nuisance, did not include such a nuisance as a brothel. His lordship, however, was of opinion that notice was necessary, and directed a verdict for the defendant on the first issue, reserving the point for the plaintiff; and the jury were discharged, by consent, on the second issue.

Erle now moved to enter a verdict for the plaintiff on the first issue, with nominal damages. The sole object of the plaintiff was to ascertain who was the party who gave the original information to the trustees, in order to take proceedings against him. If the defendant or the trustees choose to withhold this information, the grossest injustice may be done, because information against any respectable house may be given from mere malice, and yet, if the trustees bona fide act upon it, and are entitled to the protection of the act, no redress can be obtained. It is submitted therefore that the defendant was bound to give up the name of the party who made the complaint against the plaintiff. The defendant cannot justify unless the trustees could justify, and the trustees could not justify unless they proved, under sect. 105, that a complaint was made to them by an inhabitant, and that there had been a due investigation of such complaint. [Lord *Denman* C. J. The point made by the defendant was, that notice of action was necessary.] The letter of 4th August was sufficient notice. This act does not require the same particularity of notice as in an action against magistrates on 24 *Geo. 2*, c. 44, s. 1. Besides, the keeping a brothel (if it had been even proved against the defendant) is not such a nuisance as is contemplated by sect. 105.

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LITTLEDALE J.—There is certainly not so much particularity required in the notice of action under this act under the 24 *Geo. 2*, c. 44; but still I think this notice was insufficient. In *Lewis v. Smith* (a) *Gibbs* C.J. decided that a letter from the plaintiff's attorney, that he was instructed to take legal proceedings unless goods were delivered up, was not sufficient notice. So in the present case the attorney states that, unless the name of the party making the complaint is stated, proceedings would be taken against the defendant. Now the notice given by the defendant was certainly in pursuance of the act. The trustees might be mistaken, and the nuisance in question may or may not be within the provisions of sect. 105; but certainly the trustees were acting in pursuance of the act, and were entitled to notice; and, as the defendant stood in the same position as the trustees, he also was entitled to it.

PATTESON J.—Whether or not the trustees were entitled to abate a nuisance of the kind in question is another matter but enough was proved to shew that they were acting bona fide in pursuance of the act, and therefore the defendant was entitled to notice. This notice is bad for two reasons: first of all, it is conditional; secondly, it does not state that an action will be commenced after a certain time; whether that time is to be thirty days or twenty-one days, we have not now to determine. The object of a notice is to inform the party that on such a day an action will be commenced for a specified cause of complaint, and to enable him to make compensation in the meanwhile.

WILLIAMS J.—There are a great many cases in which constables and magistrates have acted without authority and yet have been held to have acted so far in pursuance of the particular acts of parliament giving them jurisdiction as to be entitled to notice of action. This is a similar case.

Lord DENMAN C. J. concurred.

Rule refused.

(a) Holt's N. P. 27.

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Monday,
May 27th.

The QUEEN v. LEIGH and others.

AT a Court of the Commissioners of Sewers for the level of Caldicot, in Monmouthshire, a presentment was found against the defendants for the non-repair of a wall called Ireland wall, on a liability *ratione teuurae*. The indictment was removed by certiorari into this Court, and tried before Bolland B., at the Monmouthshire spring assizes, 1837. The liability of the defendants to repair the wall in question by reason of their estate was admitted, and also that the wall had been destroyed on the 11th October, 1836; but it was contended, on the part of the defendants, that they were discharged from their liability, inasmuch as the wall had been blown down by a violent storm; and *Callis*, p. 145, and *Rookes'* (a) and *Keighley's* (b) cases were relied upon. The prosecutors, in support of their case, tendered in evidence entries in the minute books of the proceedings of the commissioners of sewers, commencing in 1761, requiring the then owners of the lands held by the defendants sometimes to raise, and at other times to strengthen or alter, their walls. They also tendered in evidence certain presentments of juries, commencing in 1707, and continued to the present time, requiring the owners for the time being of the lands held by the defendants, from time to time to raise such walls. The admissibility in evidence of these documents was objected to by the defendants, on the ground that it was not shewn that any thing was done under them (c). The whole of these documents were rejected by the learned baron. It was further proved

1. A liability may exist at law to repair sea walls *ratione teuurae*, even though the damage may be occasioned by tempest, without any default in the obligor.

Semble, such liability is only limited by the ability of the party liable, or the value of the lands granted.

2. To prove the liability of the defendant to repair a sea wall *ratione teuurae*, minutes of the court of sewers, commencing seventy years back, containing orders on the then holders of the estate to repair the wall in question, were held admissible.

(a) 5 Rep. 99 b.

(b) 10 Rep. 139 a.

(c) The presentments were also objected to on the grounds, first, that they appeared to have been made by a standing jury; *Rex v. Commissioners of Sewers for the*

County of Somerset, 7 East, 71;

Birkett v. Crozier, Moo. & Malk.

119, 3 C. & P. 63: second, that the particular document tendered in evidence appeared to be a copy, and not the original document, from the circumstance that the

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by the counsel for the prosecution, that the defendants had been convicted at the Court of Sewers in 1818 for not raising the wall in question; and also that after two severe storms in 1812 and 1815 the defendants had repaired the damage done to the wall, the expense of which on the latter occasion amounted to 5000*l*. It also appeared that before the storm in 1815, the wall was in as good repair before the storm in question in 1836. The counsel for the crown also endeavoured to prove that the wall was not in good ordinary repair at the time of the last mentioned storm. The learned baron told the jury that, if they were of opinion that the wall on the occasion in question was defective as not to have withstood the ordinary pressure of the weather, they must find a verdict of guilty; but, if they thought that the destruction of the wall was occasioned by the extraordinary tempest, they must find for the defendants. The jury having found a verdict for the defendants *Maule*, in the ensuing Easter term, obtained a rule nisi for a new trial, on the ground that the learned baron had misdirected the jury, in not informing them that there might be a liability to repair the wall against all mischances, and secondly, for the improper rejection of evidence.

Ludlow Serjt. and *R. V. Richards* shewed cause in Easter term last (a). *Callis*, p. 145-6, in enumerating the exceptions to the liability of repairing by prescription or otherwise, says expressly, "Sixthly, if the sea at the spring tide or at extraordinary casual swelling tides or floods, has broken down the fences and overthrown the banks, and drowned the country, without any default in the party who was held to have repaired the same, the level shall in that case make up the breach." This proposition is supported

names of all the jury, except the first, were written in the same handwriting. As the facts raising these objections did not clearly appear, the Court gave no judgment

on the point, and therefore the argument is omitted.

(a) April 20th, before *J. Denman* C. J., *Littleton*, *Pearson*, and *Coleridge*, Js.

both by cases and by principle. In *Keighley's* case (a) it was held that, where one by prescription is bound to repair a sea wall, and there is no default in him, but by reason of the sudden increase of water the wall is destroyed, the commissioners of sewers ought to tax the whole level; if there were default in him, the commissioners might charge him alone. In *Com. Dig. Sewers* (E 4), and *Vin. Abr. Sewers* (C), the same law is laid down, and was acted upon in *Rex v. The Commissioners of Sewers* (b) and *Rex v. Commissioners of Sewers for Essex* (c). It is fully admitted that, if the wall had been out of repair, the defendants would have been liable; and accordingly, in a case of *Rex v. Baker*, (MS.) on the Oxford circuit, where a sea wall on the Severn had been presented, and before it was repaired was blown down by a tempest, the defendant was held liable to rebuild it *ratione tenuræ*. The language of the commission of sewers supports this argument, for it directs the commissioners to inquire "through whose default" the damage has happened. With regard to the admissibility of the evidence, *Rex v. Smith* (d) is a decided authority that the minutes of the orders of the Court of Sewers are not admissible in evidence, that court being a court of record: *Com. Dig. Sewers* (D). It is also submitted that, as this is a criminal proceeding, the Court will not grant a second trial. [Lord Denman C. J. We should not let that stand in our way, if we thought that a new trial ought to be granted. We can hardly consider this a criminal proceeding.]

Talfourd Serjt. and *Whateley*, contra. If there can exist at law a liability to repair a sea wall against all risks *ratione tenuræ*, the direction of the learned baron cannot be supported. The words of the commission of sewers do not aid the defendants; for the question is not "through whose

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(a) 10 Rep. 139 a.

& R. 700.

(b) 8 T. R. 312.

(d) 8 B. & C. 341. See *Rex v.*(c) 1 B. & C. 477; 3 C. 2 D. *Yeaveley*, 1 Perr. & Da. 60.

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default the damage has happened, but for what default the defendants are to answer. The cases which are cited to restrict the obligation to repair *ratione tenuræ* to ordinary repairs do not support the proposition. *Keighley's case* ruled that on the occasion of an extraordinary tempest the commissioners might charge the whole level, and *Rex v. The Commissioners of Sewers* (b) is to the same effect: but those cases leave the question untouched, whether a more extensive liability *ratione tenuræ* may not exist. It is true that in *Rex v. The Commissioners of Sewers for Essex* (c), Abbott C.J. said, "Even where an individual is bound by prescription or otherwise to repair, still if there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs." That dictum, however, was extra-judicial, as the decision was that the party was liable *ratione tenuræ*, although there had been an extraordinary tempest. It does not appear how *Keighley's case* (a) or *Rookes' case* (d) came before the Court; they could not have been cases of presentment or mandamus, because they were decided in the Common Pleas, and probably were questions as to the validity of a rate. It may very well be that in case of a sudden tempest the commission may rate the whole level, in order to obtain a large sum of money immediately, without the liability of a party *ratione tenuræ* being discharged. The decisions relied on in *Keighley's case* (a) for restricting the liability are in actions of waste; but those cases fully confirm the view now taken. For although it is true that it is no waste in a tenant for years if a house be destroyed by lightning or a tempest, yet, if the tenant afterwards suffer the house to remain in decay, it is waste: *Com. Dig. Wast* (D 2) and (E 5), where *Keighley's case* (a) is cited. [*Littledale*. *Comyn* cites *Co. Litt.* 53 a, but in 53 b it is said of lan

(a) 10 Rep. 139 a.

(b) 8 T. R. 312.

(c) 1 B. & C. 477; 8 C. 2 D. & R. 700.

(d) 5 Rep. 99 b.

protected by a sea wall, "if it be surrounded suddenly by the rage of the sea, without any default in the tenant, this is no waste punishable,"—which rather conflicts with the passage in 53 a.] They are reconcilable, because a tenant, though not liable for the immediate act of waste, may be liable for a subsequent neglect to make good the repairs. Then what principle of law can there be to restrain a liability to repair *ratione tenuræ* to ordinary repairs? It is clear that no such restriction exists with regard to the similar liability to repair bridges, where it never has formed the subject for a plea that the bridge has been thrown down by a sudden influx of water.

As to the admissibility of evidence, *Rex v. Smith* (a) is inapplicable, because the minutes of orders of the Court of Sewers were not tendered to prove any substantive allegation in the indictment, but to shew the extent of liability as matter of reputation. Whether they would have much or little effect in that respect, is a question, according to *Crease v. Barrett* (b), not to be determined by the Court in banc. The orders of the Court of Sewers are also admissible as the decisions of a court of competent jurisdiction on the subject-matter, like an inquisition taken before a coroner: *Toomes v. Etherington* (c). They also cited *Brisco v. Lomax* (d).

Cur. adv. vult.

Lord DENMAN C.J. now delivered the judgment of the Court:—

In this case the defendants were charged by reason of their tenure with the repair of a sea bank. The defence was that the wall was in a state of repair sufficient to resist the ordinary action of tides and weather, and that the damage was done by an excessive and outrageous tempest, and not by any of those accidents of ordinary occurrence to which such a liability must be restricted. The learned

(a) 3 B. & C. 341.

(b) 1 C. M. & R. 919.

(c) 1 Wms. Saud. 362, n. (1).

(d) 3 N. & P. 308.

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baron who presided left that question to the jury, who thereupon acquitted the defendants. A rule for staying the judgment and proceedings till a second trial could be had was obtained on account of this direction as well as for the rejection of evidence, tending to shew that the defendants and their predecessors, who held the same lands, had in fact repaired against the effects of the more violent tempests. After argument and consulting the authorities, we are clearly of opinion that a liability of a more extended nature may well exist by law. Many prescriptive liabilities to repair must have existed before the date of the earliest statute for the issuing of commissions of sewers; many such may now exist where no commission has issued; in such cases there is no legal reason to limit the liability by any thing but the ability of the party liable, or the value of the lands granted, as the case may be. And it is clear that a commission of sewers can have no effect upon these liabilities other than to provide intermediately for the safety of the level, before the individual chargeable shall have been compelled or be able to restore the defences. *Callis* (p. 144-5) is express that the commissioners are bound by precedent, prescriptions, customs, and tenures; and we think that rightly understood there is nothing either in *Rookes'* (a) or *Keighley's* (b) cases that at all conflicts with the law as we have stated it.

We do not take upon us to say what was the extent of the defendant's liability in the present case; but there was evidence to shew that it went beyond that to which the direction of the learned judge might lead the jury to suppose it limited by law; and the jury therefore ought to have decided upon it as a matter of fact upon all the evidence. The evidence here rejected was twofold; first, orders of the Court of Sewers, made seventy years ago which were deemed inapplicable, because they were not proved to have been carried into effect; second, presentments by the jury, to which the same objection was made.

(a) 5 Rep. 99 b.

(b) 10 Rep. 139 a.

We are very clearly of opinion that such orders were **good** evidence, as adjudications by a court of competent jurisdiction over the subject-matter, unless they were affected by proof of fraud or collusion, and that at so great a distance of time their execution might well be presumed. On the admissibility of the presentments we prefer giving **no** opinion, as the facts are not quite clearly before us, and perhaps it may not be thought prudent to tender them on the next trial.

Rule absolute.

COLLINS v. BEAUMONT.

SCIRE facias to revive a judgment obtained by the plaintiff against the defendant.

Plea: that on the 7th July, 1836, the plaintiff sued out a **ca. sa.** on the said judgment against the defendant, under which he was taken in execution. Verification.

Replication: that on the 30th July, in the year aforesaid, the defendant applied for, to a judge at chambers and obtained, an order, afterwards made a rule of Court, under which order the defendant was discharged out of custody, on the ground that the suing out the said writ and the taking the defendant under it were irregular; and that the defendant had not since been in custody under the said writ, or otherwise, in the said action. Verification.

General demurrer and joinder.

Wightman, in support of the demurrer (a). If a party is taken in execution, the judgment against him is satisfied, and the plaintiff's own irregularity, on account of which the execution is set aside, can make no difference. If the plaintiff had consented to the defendant's discharge, the **ca. sa.** would not have been a nullity; it will be admitted, in

(a) At the sittings after last H. T. (Feb. 4), before Lord Denman C. J., Littledale, Williams and Coleridge Js.

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Tuesday,
May 28th.
Where a defendant, taken in execution, obtains his discharge on the ground that the **ca. sa.** was irregular, he may be taken again under a fresh writ.

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such a case, that the ca. sa. could not be treated as a nullity, and that the defendant could not be retaken. When the defendant is discharged through the plaintiff's default, should the plaintiff be in a better situation than if he had consented. [*Littledale J.* The irregularity may have arisen from some act of the Court, for which the plaintiff was to be blamed.]

Lumley, contra. The present question was decided in *M'Cormick v. Melton (a)*, where it was held that a writ of *ca. sa.* set aside for irregularity was a nullity, and not a vacation of the judgment, and that the defendant might be taken again. Lord *Lyndhurst C. B.* observed in that case: "All that we know from the record is, that a writ of *ca. sa.* was issued, under which the defendant was taken in execution, and afterwards, upon an application to a judge at chambers, that writ was set aside for irregularity. A writ so set aside for irregularity is a nullity, and is no satisfaction of the judgment."

Wightman replied.

Cur. adv.

Lord DENMAN C. J. now delivered the following judgment.—To declaration in *scire facias* defendant pleaded that he has been already arrested by virtue of a *ca. sa.* issued on the same judgment. Replication, that defendant was, on his own application, discharged from that arrest "for irregularity," not specifying what the irregularity was. Defendant demurred. On the argument we doubted whether an arrest on *ca. sa.* might not be a satisfaction of the debt, though the writ was irregular; we were referred however to a case in *M'Cormick v. Melton (a)*, where the Court of Exchequer held such a replication good, Lord *Lyndhurst* saying that a writ set aside for irregularity was a nullity. This case may possibly be too large; but we think the case was

(a) 1 C. M. & R. 525.

cided, for that a defendant cannot relieve himself from an arrest as irregular, and then set up the same arrest as a bar to a subsequent execution. We must therefore overrule the demurrer.

Judgment for the plaintiff.

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R. ROFFEY, Administrator of FRANCES MARY ROFFEY, v.
 R. GREENWELL and another, Executors of STAPYLTON.

Monday,
 May 27th.

ASSUMPSIT to recover principal and interest on a promissory note, made by *Stapylton*. Plea: payment into Court of 336*l.* 6*s.*, and that the plaintiffs had not sustained greater damages. Replication: damages ultra, and issue thereon.

The following promissory note, the consideration for which did not appear, was held to carry interest from its date: "July, 1808. I promise for myself and my executors to pay *A. B.* (or her executors), one year after my death, 300*l.* with legal interest."

The following case was stated for the opinion of the Court.

On the 20th July, 1808, *Stapylton* made to *Frances Mary Harris*, spinster, the following promissory note:

"I promise for myself and my executors to pay to *Frances Mary Harris* (or her executors) one year after my death, 300*l.* with legal interest.
 "£300. Signed. (L. s.)"

The note is indorsed, "To *Frances Mary Harris*."

On the 3d October, 1808, *F. M. Harris* married the plaintiff *Roffey*. On or about the 14th December, 1816, *F. M. Roffey* died. On the 21st August, 1835, *Stapylton* died, having appointed the defendants his executors.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover, under the circumstances, more than the sum of 336*l.* 6*s.* paid into Court.

Platt, for the plaintiff (*a*), cited *Kennerly v. Nash* (*b*), *Norton v. Ellam* (*c*), *Western v. Tomlinson* (*d*), and *Doman v. Dibden* (*e*), to shew that, where a bill or note is made payable with interest, interest is to be calculated from the date.

(*a*) At the sittings after last H. T. (Feb. 6), before Lord Denman C. J., *Littledale* and *Coleridge* Js.
 (*b*) 1 Stark. N. P. C. 452.

(*c*) 2 M. & W. 461.
 (*d*) Chitty on Bills, 8th ed. 664, note (*p*).
 (*e*) Ry. & M. 381.

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Erle contra. In cases where interest is payable from date of a bill it should appear that it was made for money lent, or at all events for value received to the hands of payee at the time of the contract. In this case there is nothing to indicate that any value was given to *Stapylton*. It would not have been consistent with the terms of the note to pay it until a year after *Stapylton's* death, and interest is evidently reserved for that period. [Lord Denman C. J. mentioned *Lithgow v. Lyon* (a).]

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—The question was, from what period interest should be computed on a note in the following form: “I promise for myself and my executors to pay *Frances Harris* (or her executors) one year after my death 300*l.* with legal interest,” no proof of the consideration being given. It was admitted that no case in point could be found, nor any which lays down the rule or principle which it is to be decided. Generally speaking, an instrument of this sort carries interest from its date, whether payable on demand or at a time specified. The reason is, that the party who makes the promise must be expected to keep it, and, if he does, no interest can be due from any other period than the date. In the present case, there is indeed another period from which it might be computed, that of the maker's death; but it appears improbable that, if that was his intention, he should not have expressed it with more distinctness. We think, in the absence of particular proof, that we must presume the note to have been given for value, so that interest would be due from the date. If there be doubtful, the instrument ought to be construed strongly against the maker. The plaintiff is, therefore, entitled to the larger sum, and judgment must be entered for it.

Judgment for the plaintiff.

(a) Coop. C.C. 29.

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WHITEHEAD v. TAYLOR.

Wednesday,
June 12th.

REPLEVIN. The defendant made cognizance as the bailiff of *Mary Hall*, executrix of *John Hall*, deceased, for rent arrear to *John Hall* in his lifetime, and unpaid at the time of his death, &c. Verification. Plea in bar, that the defendant was not the bailiff of *Mary Hall*. Issue thereon.

At the trial before Lord *Denman* C. J., at the sittings in Middlesex after last term, it appeared that the plaintiff had been tenant to the late *J. Hall*, and that, his rent having fallen into arrear, *J. Hall* ordered the defendant to distrain upon the plaintiff; the defendant made the distress accordingly in the name of *John Hall*, but, before it was actually made, *Hall* died, leaving *Mary Hall* his executrix. *Mary Hall* ratified the distress immediately, but before she had obtained probate. The counsel for the plaintiff contended that on this evidence the plaintiff was entitled to a verdict; his lordship was of a different opinion, but reserved the point, and a verdict passed for the defendant.

Where a distress was made by command and in the name of a landlord, but he died before the distress was actually made:—Held, that the bailiff might make cognizance as the bailiff of his executrix, under 32 *Hen.* 8, c. 37, who ratified the distress, although before probate.

Jervis on former day in this term (a) moved for a rule nisi to enter a verdict for the plaintiff. At common law, an executor could not recover the rent in arrear at the time of his testator's death. By 32 *Hen.* 8, c. 37, s. 1, however, executors are enabled either to bring an action of debt, or to distrain for rent arrear. But it is clear that the executrix in this case could not bring an action of debt at the time when the distress was made, because, although an executor may do many things before probate, yet, to maintain an action, probate must be made of the letters testamentary. It is clear therefore that the statute does not by relation give the right to bring the action. Again, the defendant made the distress as the bailiff of *J. Hall*, but, as

(a) May 25th, before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

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John died before the distress was made, his authority was revoked. A somewhat similar point to this was discussed but not decided, in *Taylerson v. Peters (a)*, where a question was made, whether the ratification of a distress after an action brought was sufficient. [*Littledale J.* A number of cases are collected on this subject in 4 *Vin. Abr. Bail D*, p. 1, from which it would appear that the plaintiff cannot traverse the defendant being bailiff.]

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—The evidence in this case shewed that the testator had given defendant authority to distrain, but died almost immediately before the distress was taken. After the distress had been taken in the testator's name, the executrix fully recognised and adopted defendant's act of distraining. It was objected, that by testator's death the authority was revoked, that the executrix had no power to distrain before probate, because she could not maintain an action for the rent at that time, and that the distress being made in the name of one whose authority had expired with his life could not be ratified by his executrix afterwards. We are of opinion that both these objections are removed by the principle of relation.

I. The rent was due to the estate, and the law knows no interval between the testator's death and the vesting of the right in his representative. As soon as he obtains probate his right is considered as accruing from that period. If an action indeed be brought in that interval, he cannot proceed to declare, because he must make probate of the letters testamentary in his declaration; but that reason does not apply to a distress or any other act performed in an assertion of his right as executor.

II. The executrix could ratify the act of defendant or testator's bailiff, though his authority was at an end, for she might have ratified the act of an entire stranger,

(a) 2 N. & P. 622.

appears by the decision of *Anderson C. J.*, in which *Periam* concurred in an *Anonymous* case in *Godbolt's Reports*, cited 4 *Vin. Abr.* p. 1, tit. Bailiff. Such ratification has been held to legalize a past act even when given after action brought.

We, therefore, think that there ought to be no rule.

Rule refused.

The QUEEN v. The LORDS COMMISSIONERS of the
TREASURY, in re LOXDALE.

Monday,
May 27th.

SIR *W. W. FOLLETT*, in Hilary term last, had obtained a rule nisi for a mandamus to the Lords of the Treasury, commanding them to hear and determine on the merits the appeal of the said *Lordale*, on his claim to compensation for the loss of all the emoluments of his office of common clerk of the borough of Shrewsbury. The affidavit of *Mr. Lordale*, who is a barrister at law, set out the following facts: The governing charter (14 *Car.* 1) of the borough of Shrewsbury contained a clause enabling the corporation to appoint a common clerk of the borough, to exercise the office by himself or deputy for life, whose duties were prescribed to be to make up the recognizances taken before the mayor or other justice of the borough, and to record all the acts and laws of the corporation, and all proceedings and acts of court at the sessions of the peace, and all actions in the court of record, and at whatsoever other courts were held within the same town. *Mr. Lordale* was appointed to this office in September, 1833, and in the October following appointed a deputy. On the 1st January, 1836, when the Municipal Corporation Act came into operation, the town council passed a resolution that "*J. Lordale, Esq.* compensation, their lordships awarded him compensation for the offices of clerk of the peace and clerk to the justices, but refused to award any for the office of town clerk, to which he had been re-elected, and this Court refused to issue a mandamus to the Lords of the Treasury, to determine his claim to compensation for the loss of that office.

Before the passing of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), the common clerk of a borough, under the terms of the governing charter, discharged the duties of town clerk, clerk of the peace and clerk to the justices, and possessed the power of appointing a deputy. On the passing of that act the town council appointed him to the office of town clerk, but he refused the appointment. On appeal to the Lords of the Treasury for

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be appointed town clerk." Mr. *Lordale* declined to accept the appointment, and applied to the town council for compensation under section 66 of the Municipal Corporation Act. The town council having refused any compensation Mr. *Lordale* appealed to the Lords of the Treasury, who on the 11th January, 1839, made the following order:

"Upon a full consideration of the papers before them and the opinion of the law officers of the crown, my lords consider that as Mr. *Lordale* was re-elected to the office of town clerk he is not entitled to compensation for such part of his emoluments as appertained to the office of town clerk, but that, as he was not re-elected to the office of clerk of the peace or clerk to the magistrates, he is fairly entitled to compensation for the loss of the emoluments he would have lost, although he had continued as town clerk when re-elected, and which were received by the town clerk acting as clerk of the peace and clerk to the justices.

"Having before them the account furnished by Mr. *Lordale*, my lords are pleased to award to him an annuity 120*l.* per annum, as compensation for the loss of his office of common clerk."

The affidavit then stated that the present office of town clerk differs materially from any portion of the old office of common clerk; that it was no longer an office for life, but at pleasure only; that a deputy could not be appointed to it, and that the emoluments were very much reduced from a portion of the borough being cut off from it.

Sir *J. Campbell* A. G., Sir *F. Pollock* and *Wightman* shewed cause on a former day in this term (a). The answer to Mr. *Lordale*'s application is, that the Lords of the Treasury have heard and determined his appeal on the merits. This case is the converse of *Rex v. The Mayor of Bridg*

(a) May 25th, before Lord *Denman* C. J., *Littledale*, *Patteson* & *Williams* Js.

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water (a), where it was held that a town clerk was entitled to compensation for such offices as he was not reappointed to, but it never was contended that a town clerk was entitled to compensation for an office to which he was reappointed. Suppose the writ were to issue, what could the Lords of the Treasury determine, except that they had heard and determined? Even if they had determined unjustly this Court cannot review their decision. The Lords of the Treasury have no power to state points of law for this Court like the sessions, and accordingly they must decide as they best can. The true nature of this application is, that it is an attempt to review the decision of the Treasury, Mr. *Lordale* not being satisfied with the amount awarded.

Cresswell, E. V. Williams and L. Peel, contra. The office of common clerk was different in its nature from the office of town clerk, and has been totally abolished by the act. It was often deemed expedient to obtain the services of a barrister, as at Bristol (b), in which case the power of appointing a deputy was a valuable privilege. Suppose, in the case of a barrister filling such an office, that on the new bill passing a portion of the office is offered him, with duties which his station would not allow him to discharge, and which therefore he must necessarily refuse, would that deprive him of all right to compensation? Mr. *Lordale*'s appointment was not like that of many other town clerks, who also exercised the offices of clerk of the peace and clerk to the justices, sometimes by a separate appointment, sometimes by custom. Here, under the charter, Mr. *Lordale* was bound to discharge the duties of all these offices, and would have been subjected to amotion if he had declined, it is clear therefore that the office of town clerk, to which he was reappointed, is not the same office.

(a) 1 N. & P. 466.

be a barrister of five years' stand-

(b) The governing charter of
Bristol required the town clerk to

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Then how could the corporation reappoint him to a portion of his old office, which was one and indivisible? It may as well be said that they could have defeated his claim to compensation by appointing him alderman or serjeant at mace. This view is confirmed by what fell from Coleridge J. in *Rex v. The Mayor of Bridgewater* (a): "Before the act passed he (the late common clerk of Bridgewater) was an officer of the borough without doubt; the office he held then has been abolished, and he has been appointed to an office of a totally different description." It is said that the Lords of the Treasury are to make such an order as to them seems fit, but could they make an order refusing all compensation? Now it appears on the face of their minute that their lordships had not considered the claims for compensation for that part of the office said to be filled now by the town clerk. The decision therefore is not upon the whole case. They also cited from MS. the Lord Chancellor's judgment in *Rex v. The Corporation of Poole* (b).

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court (after stating the facts of the case, his lordship proceeded as follows):—It is upon the form of the Treasury minute that the application for a mandamus has been chiefly founded, it having been contended that it clearly appears therefrom that Mr. *Lordale's* claim, or at least *a portion of it*, was never heard or considered *at all*. And that is the real question; because it was properly conceded in the argument (by analogy to the course uniformly pursued by the Court in awarding or refusing the writ of mandamus to justices, &c.) that, if the Lords did hear and consider the case, a mandamus ought not to go, even if the Court should be satisfied that the compensation had been awarded upon an erroneous and mistaken principle. The language of the

(a) 1 N. & P. 466.

(b) Not yet reported.

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66th section, as to the manner of making compensation by the council, is, "that an adequate compensation is to be assessed by the council for the salary, fees and emoluments, which the person shall so cease to hold, regard being had to the manner of his appointment to the said office, and his term or interest therein, and *all other circumstances of the case;*" and, as to the appeal, "that a person thinking himself aggrieved, may appeal to the Lords of the Treasury, who shall thereupon make such order as to them shall seem just, and such order shall be binding upon all parties." And we think that it must be understood that the appeal is to be conducted upon the same principle as the original hearing before the council, "with regard to all the circumstances of the case."

The most favourable view of the subject for the applicant we presume to be, to *suppose* that the office of common clerk has been abolished, because that was contended for by his counsel, though we beg to be understood as expressing no such opinion; supposing however that to be so, what is the fair import of the Treasury minute? We think it is quite apparent that the Lords were considering the value of the lost office, because (what they obviously deemed to be) its component parts are analyzed; and those were clerk of the peace, clerk of the justices and town clerk. For the two former, which they treated as lost, and under circumstances to call for compensation, they awarded the above-mentioned annuity, but for the latter nothing, and give as a reason that he might have had the office of town clerk if he had chosen. This therefore seems clearly to show that the Lords of the Treasury had the lost office and all the parts of it) full under their notice. Suppose one part of the emoluments of the common clerk to have been a house of the value of 100*l.* per annum, and that upon the change the same house had been offered to him, which for some reason he had refused, could it possibly have been contended that such refusal was not "*a circumstance*" for the consideration of the Lords of the Treasury?

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And yet what is the material distinction? But we forbear to follow the investigation of the *principle* of the decision, the only question being, whether the Lords have heard and decided *at all*, because, if they have, that decision is by the act expressly declared to be final. The fallacy seems to be in inferring that, *because* nothing is allowed to the applicant in respect of that part of his former duty which they designate as the town clerk's, therefore his claim has never been under consideration by the Lords of the Treasury at all.

We however have arrived at a contrary conclusion, and the consequence is that the rule must be discharged.

Rule discharged.

Friday,
May 24th.

HALL v. BUTLER and another.

Replevin.
Avowry for rent. The plaintiff had been let into possession of premises, as tenant for a year, by N., six months' notice to be given on either side, and had paid rent to him. Before the end of the year the defendant went to plaintiff and claimed title, and desired that the rent in future should be paid to himself. The plaintiff, in order to be satisfied of the truth, went with defendant to N., who admitted defendant's title, and that plaintiff must consider him landlord:—Held, that the plaintiff, who assented and subsequently paid rent to the defendant, could not contest his title.

REPLEVIN. 1. *Butler* avowed as landlord, and the other defendant made cognizance for a quarter's rent due the 25th March, 1835. 2. The defendants made cognizance as bailiffs of one *Nevitt* for the same rent. Pleas in bar: 1. To the avowry and first cognizance, non tenuit. 2. To the last cognizance, first, non tenuit, and secondly that the defendants were not bailiffs to *Nevitt*.

On the trial of the cause before the Recorder of Chester it appeared that the plaintiff came into possession the 25th March, 1834, as tenant to *Nevitt*, under the following written agreement:—"Agreed to let my house, &c. to Mr. *Hall* for 15*l.* a year, to be paid quarterly. Six months' notice to be given on either side." The agreement was signed by *Hall* only, but was in the handwriting of *Nevitt*. The Christmas following, after rent had been paid to *Nevitt* by the plain-

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tiff, the defendant *Butler* told the plaintiff not to pay any more rent to *Nevitt*, as he (*Butler*) was landlord. On this the plaintiff, in order to be satisfied of the correctness of this representation, went with *Butler* to *Nevitt*, when the following conversation took place:—The plaintiff said to *Nevitt*, “This gentleman (meaning *Butler*) is coming to make claim to the house I live in, and I wish to have it settled now.” *Nevitt* said that *Butler* was the landlord, and that he (*Nevitt*) would give it up to *Butler* then. The plaintiff then said, “Is Mr. *Butler* my landlord, is that right Mr. *Nevitt*?” *Nevitt* said that it was, and added, “Must I have this quarter’s rent that is due, or must you have it, Mr. *Butler*?” *Butler* said, “You may have this quarter’s rent.” *Nevitt* then said to plaintiff, “You must pay the Lady-day rent to Mr. *Butler*.” Plaintiff answered, “Well, then, must I consider Mr. *Butler* as my landlord now?” and *Nevitt* answered in the affirmative. On the 26th March, 1835, the plaintiff paid a small part of such last-mentioned rent to *Butler* as his landlord: the distress put in for the balance gave rise to the present action. The defendants also went into evidence of title. The defendant *Butler* claimed as heir at law to *Joseph Butler*, who had devised the premises in question to his daughter (who married *Nevitt*) with remainder to her children. It was admitted that she had died in 1828 without issue, and that the defendant *Butler* was heir at law to the testator. On the part of the plaintiff it was proposed to shew that the testator, at the time of his death, had no interest in the premises. The recorder was of opinion that the plaintiff was estopped from disputing the title of *Butler* the defendant, and directed a verdict for the defendants on the first issue, and for the plaintiff on the other issues, and gave leave to the plaintiff to move to enter the verdict for himself on the first issue. The jury having found a verdict accordingly, *Townsend* obtained a rule nisi to enter the verdict for the plaintiff on the first issue, or for a new trial.

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W. H. Watson appeared to shew cause, but the Court called on

Townsend to support the rule. The plaintiff could dispute the title of *Nevitt*, from whom he received possession, but he was at liberty to shew that he attorned the defendant in ignorance, and that the defendant had in no title to the premises; *Rogers v. Pitcher* (a), *Gregory v. Doidge* (b), *Hopcraft v. Keys* (c), *Williams v. Bartmew* (d), *Harrison v. Barnby* (e), *Cornish v. Searell* (f), *Doe d. Plevin v. Brown* (g).

W. H. Watson, contra. In this case *Nevitt* must be taken to have disclaimed title altogether, and to have said *Butler* was landlord from the commencement. In all the cases cited the actual demise has been by a party having a good title, and then on the death of the landlord, on some similar occasion, there has been attornment by the tenant, or in consequence of misrepresentation by the person attorned to, as in *Gregory v. Doidge* (b). In *Cornish v. Searell* (f) the attornment was to "sequestrators named in a certain writ of sequestration, issued in a certain cause now pending in the Court of Chancery." They have no legal title, so that the attornment was bad on the face of it. This case admits of another view also. *Watson* appears to have said this, in effect, to the plaintiff, "You have no title, so unless you become tenant to *Butler* you will be turned out." In this view, a fresh letting was made at the time of the conversation; the plaintiff was clothed by *Butler* with the right of possession, so that the issue on non tenuit has been properly found for the defendants.

(a) 6 Taunt. 202.

(b) 3 Bing. 474.

(c) 9 Bing. 613.

(d) 1 B. & P. 326.

(e) 5 T. R. 246.

(f) 8 B. & C. 471; 1
Mann. & R. 703.(g) 7 A. & E. 447; S. C.
& P. 592.

LORD DENMAN C. J.—The cases cited appear to have turned on the fact that some sort of misrepresentation had been made to the tenant. In this case it seems that *Nevitt* was in possession after the death of his wife, on which event his title expired. Then he and *Butler* and the defendant all come together, and *Nevitt* tells the plaintiff that he himself has no title, and that *Butler* is the plaintiff's landlord. The conversation between the parties may perhaps justify the view suggested, that the original letting was by *Butler*, for he adopts the plaintiff as his tenant. But, suppose this not to be so, there was a fresh letting by *Butler*, and, as no fraud or misrepresentation is imputed, the ordinary rule must prevail, that the tenant cannot dispute the title of the party from whom he has consented to take possession.

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LITLEDALE J.—I do not think that there was an original letting by *Nevitt* as the agent of *Butler*, but that the plaintiff may be considered to have taken the premises of *Butler* at the time of the conversation. The first issue, therefore, was rightly found for the defendants,

PATTESON J.—I quite agree in the distinction that the tenant cannot dispute the title of the person who gave him possession, but that, where on the death of such person, or on any other occasion, the tenant is induced by misrepresentation to attorn to another, the tenant may dispute his title. Whether the plaintiff took the premises, in the first instance, of one party or the other, is rather a question of fact than of law. I am not prepared to say that the original taking was not of *Butler*, according to what was stated by *Nevitt* at the conversation, and adopted by *Butler*. But suppose that not to be so, *Nevitt*, in effect, says, 'I have no title, and cannot protect you; if you wish to remain in possession, you must become tenant to *Butler*, and pay rent in future to him.' The plaintiff assents and

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pays rent accordingly, so that at all events there was a new taking of *Butler* at that time.

WILLIAMS J. concurred.

Rule discharged.

Tuesday,
May 28th.

DOR *d.* ELIZABETH EVANS v. HENRY EVANS.

Where a testatrix by her will devised all her estate to *L. E.* for life, and to his sons and daughters successively, in strict tail, and *L. E.* and his only son died in the lifetime of the testatrix, but he left a daughter, *E. E.*, of whose birth she knew nothing, and she thereupon made a codicil, in which she recited her former will, and that *L. E.* had died without leaving any issue, and then devised over; held, that, as this codicil was made in ignorance of the existence of *E. E.*, it was only a conditional

EJECTMENT. At the trial before *Alderson B.*, at the Summer assizes 1837, for the county of Anglesey, a verdict was taken for the lessor of the plaintiff, subject to the opinion of the Court upon the following case.—

Jane Jones, late of Beaumaris, in the county of Anglesey, widow, being seised in fee of certain freehold premises in or near to the town of Holyhead in the said county, by her last will and testament, in writing, bearing date the 28th day of July 1819, devised the same to trustees “to the use of *Lewis Evans* of Holyhead aforesaid, mariner, and his assigns, for and during the term of his natural life, without impeachment for any manner of waste, and from and after the determination of that estate by forfeiture or otherwise in the lifetime of the said *Lewis Evans*, to the use of the said trustees and their heirs during the life of *Lewis Evans*, in trust to preserve contingent remainders, but nevertheless to permit and suffer the said *Lewis Evans* and his assigns during his life to receive and take the rents, issues and profits thereof to his and their own use and benefit, and from and after his decease, to the use of the first and every other son of the said *Lewis Evans* in strict tail male, and for default of such issue, to the use of the first and every other daughter of the said *Lewis Evans* in strict tail

Some time after making the codicil, the testatrix was made acquainted with the existence of *E. E.*, but made no further testamentary disposition; held, that this did not set up the codicil, for, having been once revoked, it could only be republished according to the Statute of Frauds.

and for default of such issue, to the use of my own right heirs for ever."

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On the 27th day of May 1829, *Jane Jones*, the testatrix, duly made and executed a codicil to her will in the words following: "Whereas in and by my said will I have given the residue of my messuages, lands, tenements, hereditaments, and real estate (subject to an annuity of 20*l.* to my cousin *Richard Owen* for life,) to the use of *Lewis Evans* of Holyhead, mariner, and his assigns, for life, with remainder to his first and other daughters in tail, with remainder to my own right heirs; and whereas the said *Lewis Evans* has since departed this life without leaving any issue, now I do hereby give and devise all the residue of my messuages, lands, tenements, hereditaments, and real estate, as mentioned in my said will, (subject to the payment of the said annuity as aforesaid) unto and to the use of my relation *Henry Evans*, of Holyhead, and his assigns for the term of his natural life, without impeachment of waste; and, after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the trustees in my will mentioned and their heirs during the life of *Henry Evans*, in trust to support the contingent remainders hereinafter limited; and, after the decease of *Henry Evans*, to the use of the sons of *Henry Evans* in strict tail male; and, for default of such issue, to the use of the first and every other daughter of the said *Henry Evans* severally and successively in strict tail."

Lewis Evans and *Henry Evans* were each related in the same degree to the testatrix, and were first cousins to each other, *Lewis Evans* being the son of the elder brother of *Henry Evans's* father.

Lewis Evans was married in 1818, and in 1820 had a son born. *Lewis Evans* died in September 1821, leaving his wife pregnant with *Elizabeth Evans*, the lessor of the plaintiff, who was afterwards born a posthumous child in February 1822. The son of *Lewis Evans* died in 1825. The testatrix, when she made the codicil to her will in 1829,

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did not know of the birth and existence of *Elizabeth*, the daughter of *Lewis Evans*, but she became acquainted with those facts afterwards in 1831, two years before her death; the testatrix died in 1833.

The question for the opinion of the Court is, whether the codicil, being made under the above circumstances, has the effect of revoking the devise of the residuary real estate in the will; under which devise the lessor of the plaintiff claims the premises in question.

If the Court shall be of opinion that the codicil does not revoke the devise in the will, but that the devise to the lessor of the plaintiff was a valid and subsisting devise at the time of the death of the testatrix, and that she was entitled under the same to the premises in question, the verdict is to stand. But, if the Court shall be of a contrary opinion, then the verdict is to be entered for the defendant.

R. V. Richards (with whom was *Townsend*) now argued the case for the lessor of the plaintiff. The rule of law is now clear, as stated by *Powell* (a), "that if a man by a subsequent will or codicil make a disposition different from a former one under a false impression, the impulse of which is the foundation of his will to change his former disposition, such an act will be considered only as effecting a partial or agent presumptive revocation, depending upon the existence or non-existence of that fact." The same rule is laid down in *Swinburne* (b), and adopted in 1 *Will. Execut.* (2d ed.), and 2 *Roberts on Wills*, 40, (3d ed.), for it applies to wills both of personalty and realty; and is fully supported out by the cases of *Campbell v. French* (c), *Kennell v. Bott* (d), *In the Goods of Moresby* (e). If indeed the intention in the testator's will does not proceed on his belief that a particular fact to exist, but on his uncertainty whether it exist or not, then the codicil is a good revocation

(a) 1 *Powell's Devises*, 523, 3d ed. by Jarman.

(b) 3 *Swinburne*, 894, part 7, s. 5, 7th ed.

(c) 3 *Ves.* 321.

(d) 4 *Ves.* 802.

(e) 1 *Hagg. Ecc. R.* 37

previous will, because the testator is taken to have cut the matter short by deciding in what way his property shall devolve, *Attorney General v. Ward* (a), *Attorney General v. Lloyd* (b). In *Marston v. Roe* (c), marriage and the birth of a child were held to revoke a previous will, on the ground that there was an implied reservation at the time of making it, that it was not to take effect if those circumstances occurred; so, in the present case, the codicil, which expresses the will of the testator, was only intended to take effect in case of the previous object of his bounty being dead.

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Jervis (with whom was *Welsby*), contra. It is admitted that the construction of this will must turn on the intention of the testatrix, but, as a will speaks from the death of the testatrix, and as she allowed her codicil to stand after she became acquainted with the fact of *Elisabeth Evans* being alive, it is quite clear that it was not her intention that her previous will should operate. There are many similar cases—suppose a party intends to cancel a will, but does not actually do so, there is no revocation (d); so if he has two wills in duplicate and destroys one, but permits the other to exist, there is no revocation. The doctrine laid down in *Swinburne* (e) is founded on the case mentioned in *Cicero* (f), “*Pater credens filium suum esse mortuum, alterum instituit heredem; filio redeunte, hujus institutionis vis est nulla*,” but this doctrine is not wholly adopted into the common law. Thus *Powell* (g), in the passage cited, states that it is only where the testator acts under a false impression, originating from a deceit practised on him, that the implied revocation takes effect, and in *Kennell v. Abbot* (h), which is one of the earliest cases, a gross fraud was practised, which was the foundation of the decision, and Sir

(a) 3 Ves. 327.

(b) 3 Atk. 551.

(c) 2 N. & P. 504.

(d) See *Doe d. Reed v. Harris*, 1 N. & P. 405, and 2 N. & P. 615, as to a distinction in this respect between a revocation under the

Statute of Frauds and at common law.

(e) 894, part 7, s. 5, 7th ed.

(f) *De Oratore*, lib. i. c. 38.

(g) 1 Pow. Dev. 525.

(h) 4 Ves. 802.

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R. Arden M. R., carefully distinguished the case from a legacy left for a reason which turns out to be erroneous. In the civil law, as appears by *Swinburne*, ub. supra, it is stated that a false cause doth not hurt the disposition; and in the *Attorney General v. Lloyd* (a), Lord *Hardwicke C.* said, "it is a very nice thing to say, that, because the reason a man gives for his devise is false, therefore his devise shall fail," and both in that case and the *Attorney General v. Ward* (b), the misrecital was as strong as in the present case. Those decisions, therefore, shew that, where the devise is absolute, the Court will not look at the reasoning on which it is founded. In *Kennell v. Abbott* (c), Sir *R. Arden M. R.* relied on a passage in the civil law, of which he stated the meaning to be "that a false reason given for a legacy is not of itself sufficient to destroy it, but there must be an exception of any fraud practised, from which it may be presumed that the person giving the legacy would not, if that fraud had been known to him, have given it."

R. V. Richards in reply. *Campbell v. French* (d), *In the Goods of Moresby* (e), and *Gordon v. Gordon* (f), shew that the distinction taken by *Powell*, as to the necessity of the false impression of a testator being caused by fraud, is not a sound one. The argument as to the testatrix allowing the codicil to stand after she had discovered the existence of *E. Evans* cannot avail, for in *Marston v. Roe* (g) similar reasoning was urged without success. If the codicil contained an implied condition that it was not to operate if *Elizabeth Evans* was alive, no subsequent conduct of the testatrix could give it absolute validity without, a republication according to the Statute of Frauds. With regard to cancellation, where a testator commences to destroy a will, but does not do so entirely, the question turns on, whether he

(a) 3 Atk. 551.

(b) 3 Ves. 327.

(c) 4 Ves. 808.

(d) 3 Ves. 321.

(e) 1 Hagg. Ecc. R. 378.

(f) 1 Mer. 141.

(g) 2 N. & P. 504.

had completed his intention or not, *Doe v. Perkes* (a). [Lord DENMAN C. J. An observation in *The Lord Cheyney's case* (b) seems applicable, "if a man has two sons by the name of *John*, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son *John* generally, and in truth the elder is living; in this case the younger may, in pleading as in evidence, allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead."] Evidence would be admissible then, because the ambiguity is latent, and it is necessary to shew which *John* the testator intended. [*Patteson* J. Though it appeared there that the testator thought his elder son was dead, there was nothing to shew that, if he had known him to be alive, he would have made him his heir.]

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LORD DENMAN C. J.—I think it is clearly established by the cases, that, where an alteration in a devise is made on an assumption which turns out to be false, there is a condition annexed that the will so made is to be revoked if the fact is not as the testator supposes. Every case therefore must turn on the words of the will. In this case I think the revocation of the previous will was conditional only, and depended on the fact of no such person as *Elizabeth Evans* being in existence. As it turned out that there was such a person, the intention to revoke was never completed. The case put in *The Lord Cheyney's case* (b) struck me at first, but it is certainly distinguishable, for there there was no previous will, and, as observed by my brother *Patteson*, did not appear that the testator ever intended to devise his eldest son.

LITTLEDALE J., after stating the terms of the will and codicil said :—I think no estate passed by the codicil. The old cases appear to have drawn some distinction be-

(a) 3 B. & Ald. 489.

(b) 5 Rep. 68, a.

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tween an assumption of fact by the testator, caused by the fraud of the legatee, or by the mere ignorance of the testator, but that distinction does not exist now. If subsequently to her codicil she became acquainted with the fact of *Elizabeth Evans* being alive, she ought to have republished it, if she wished her former will not to stand.

PATTESON J.—We must look at the meaning of the codicil to see if it operates as an absolute revocation of the will or not, and must ascertain the intentions of the testatrix at the time of making it. *Lewis Evans* and his children having been the objects of her bounty at the time of making her will, at the date of her codicil *Lewis Evans* was dead, and his son also had died, about whom she says nothing, but of whose existence and death she must be taken to have been aware. But he left also a daughter, of whose birth the testatrix knew nothing. Then she begins her codicil “whereas in and by my last will I have given the residue of my lands to *Lewis Evans* for life and his daughters, and whereas *Lewis* had died without leaving any issue,” and then proceeds to devise over to those whom the defendant represents, so that I think this must be taken as a conditional revocation, and it ought to be read thus, “provided *Lewis Evans* did die without leaving any issue.” If there were issue living, the devise over would become impertinent, and her doing nothing afterwards would have no effect in setting up the codicil, as clearly appears by *Marston v. Roe* (a). The language of Lord *Hardwicke* in *Attorney General v. Lloyd* (b) is undoubtedly strong; but I think I see what was passing in his mind. If the doctrine contended for had prevailed to its full extent, it would have had the effect of making a devise void wherever a false cause was expressed, and Lord *Hardwicke* hesitated to express an opinion, which would in such cases have the effect of making a man die intestate; but there is a great difference between a simple

(a) 2 N. & P. 504.

(b) 3 Atk. 551.

and one which divests objects of the testator's bounty declared by a previous instrument, merely from a closed state of circumstances which turns out to be erroneous.

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WILLIAMS J.—It is agreed that this case must turn on the intention of the testatrix, but her intention in favor of her family appears as strongly in the codicil as in the will. For, although in the codicil the devise is directed to other objects, it is only on the supposition of there being no issue of *Lewis Evans* in existence. If intention, therefore, is to govern, the case is as clear as possible, that only a conditional revocation was intended by the testatrix.

Judgment for the plaintiff.

The QUEEN v. PITT and Another.

Thursday,
May 30th.

RULE, in Trinity term last, had obtained a rule calling on the defendant, lord of the manor of Minty, and his ward of the said manor, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to admit the surrender of *Richard Goodrich* of certain copyhold hereditaments within the said manor. By the affidavits on which the rule was obtained, it appeared that Sir *Henry Loraine Baker*, on the 27th March, 1839, on a petition to the Court of Chancery, obtained an order that it should be referred to the Master to inquire and state to the Court whether *John Wade*, deceased, in his petition named, was a trustee of the legal estate in the said manor. When a party, claiming to be heir-at-law of the last cestui que trust of a copyhold estate, petitioned the Court of Chancery, under 11 Geo. 4 and 1 Will. 4, c. 60, who referred it to the Master to ascertain whether there was any heir-at-law of the last trustee, and on the Master's report made an order stating that there was no such heir, and appointing R. G. to convey or surrender the legal estate to the petitioner, the Court of Q. B. refused to interfere by mandamus to compel the lord of the manor to accept a surrender from him, as the Court of Chancery had full jurisdiction, and was a fitter tribunal to inquire into the matter. The person appointed by the Court of Chancery to convey instead of the heir, under 8 Geo. 4, does not take the complete legal estate, per *Patteson J.* *See*, whether copyholds are included in the 11 Geo. 4 and 1 Will. 4, c. 60.

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certain copyhold premises, within the meaning of the 11th Geo. 4 and 1 Will. 4, c. 60, s. 8 (a); and, if he was such trustee, then that the Master should report who was his heir, or whether it was unknown or uncertain whether such heir was living; and, if so, that he should approve of some proper person to be appointed in the stead of such heir-at-law to convey the legal estate in such copyholds. The Master reported that *John Wade* was a trustee within the meaning of the act, and that he died on the 8th April, 1793, without devising the trust estate, and that his heir was not known, that Sir *H. L. Baker* was the customary heir-at-law of the last cestui que trust, and entitled to the copyhold premises, and the Master approved of the said *Richard Goodrich* as a proper person to be appointed instead of such heir to convey or surrender the legal estate in the said copyhold premises. The Master of the Rolls, by an order of the 21st January, 1836, confirmed the Master's report, and appointed *Richard Goodrich* a trustee instead of the customary heir of *John Wade*, to convey or surrender the legal estate in the premises, pursuant to the act of parliament. The defendant *Pitt* having made proclamation at three successive Courts in 1819 and 1820 for the customary heirs of *John Wade* to appear and be admitted, in default of such appearance had seized the copyhold into his own hands quousque. An application by *Goodrich* to be admitted, for the purpose of making a surrender, and a refusal by the defendants, were then averred.

The affidavits in answer stated that the order had been obtained from the Court of Chancery on an *ex parte* application, and without the knowledge of the defendants; that Sir *Henry Baker* had not made out to the defendants any title as heir to the last cestui que trust, and was not believed to have any title, and that applications had been made by other parties to be admitted as the heirs-at-law of *Wade*, and submitted that no person ought to be admitted tenant

(a) See the section set out in the judgment of Lord *Denman* C. J. *post*, p. 389.

ed to surrender until his title had been substantiated
 icial investigation.

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and *R. V. Richards* now shewed cause. Even
 olds are included within the purview of the 11
 and 1 *Will.* 4, c. 60, which is doubtful, this Court
 urisdiction to interfere. The application assumes
Henry Baker has the equitable title; but, if he has,
 obtain his remedy in the Court of Chancery, which
 icient answer; if he has not, it would be prepos-
 o set the powers of this Court in motion, especially
 ffect of the rule is at once to give Sir *Henry Baker*
 d estate. [*Littledale J.* Section 8 of 11 *Geo.* 4
Vill. 4, c. 60, which gives the Court of Chancery
 o appoint a trustee, confers no jurisdiction on this
 and we clearly have not the machinery to carry the
 of the act into effect.] Clearly not; section 12 of
 provides expressly for a case of this kind, when, on
 of the length of time which shall have elapsed, the
 the person claiming a conveyance shall be doubtful,
 acts that the Lord Chancellor may direct a bill to
 to establish the right of such party. If a bill had
 ed, the first step of that Court would have been to
 e lord of the manor to come before them, and make
 arty to the suit. The case contemplated by sect. 8
 which the facts are not in dispute at all, and all that
 nded was to enable the Court of Chancery to ap-
 trustee, when a party entitled could not make a
 nce, from the difficulty of discovering who the exist-
 tee was. Even therefore if the Court had jurisdic-
 ould not interfere, as the title of the cestui que
 not established. If copyholds are included in the
 ch would seem not to be the case, as they are not
 l by name, and the word “surrender” in section 2
 to apply to leases of freehold land only; but, even
 olds are included, a court of equity may ascertain
 cestui que trust is, and carry the act into effect, but

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this Court will not interfere. It will be observed also that the rule calls upon the lord to accept the surrender of a person who has not been admitted, but the rule at common law is, that the surrender of a party not admitted is a nullity.

Cresswell and Whatley, contra. This is a remedial statute, and therefore the Court will give effect to it. There can be no doubt that copyholds are included, for the interpretation clause (s. 2) enacts, that the provisions shall extend to land or real property of whatever *tenure*, and the 4 & 5 Will. 4, c. 23, which is in *pari materia*, includes copyholds *nominatim*. The evil to be remedied applying to copyholds as strongly as to freeholds, a construction will not be adopted to exclude the former, in order to preserve certain rights of forfeiture in the lord, which are not favoured at law. If the objection made by the lord now is to prevail, although he has only seized the land *quousque*, he may keep it for ever. The question is, whether, as the Court of Chancery has ascertained that no heir is to be found and has substituted an heir, this Court will not lend its aid to carry the act into execution. It is said that the Master of the Rolls might have ordered Mr Goodrich to be admitted, but he could not, for having directed a surrender, he was *functus officio*. [*Littledale J.* The Master of the Rolls has the same power at common law to order an admittance at this Court.] Under this statute he has no such power. If the real heir applied to this Court for a mandamus, it would be granted to him. Why then, as there is a *hæres factus* by the Court of Chancery under this act, should it be refused to him? This view gets rid of the objection made as to the application being to accept a surrender, and not for an admittance, because an heir does not need admittance to make a surrender, Com. Dig. Copyhold (G. 1), and the lord receives no damage thereby, as the surrenderee may be admitted, and then the lord's fine is payable. The order of the Court of Chancery is in the nature of a decretal order and must be taken to have been made on due investigation.

of the facts. [*Littledale J.* It is not for the Court of Chancery to ascertain who the heir is, that is a fact which should be found by the homage.] That may be necessary in order to enable the lord to seize *quousque*, but section 8, which is the foundation of these proceedings, and which authorises the Court of Chancery to make an order when it shall not be known who is the heir of the last trustee, does not limit that Court to ascertain the facts through the medium of the homage only. It is said that a bill should have been filed under sect. 12, to establish the claimant's right, but the answer is, that, if the Master of the Rolls had thought it necessary he would have directed such a proceeding. As a court of competent jurisdiction has substituted *Mr. Goodrich* for the real heir, it seems impossible to distinguish this application from the usual one of an heir asking the assistance of this Court to obtain his rights.

Lord DENMAN C. J.—This is an application to the Court to carry into effect the 11 *Geo. 4* and 1 *Will. 4*, c. 60, section 8 of which enacts, “that where any person seised of any land upon any trust shall be out of the jurisdiction of, or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid was living or dead, or if known to be dead, it shall not be known who is his heir,” then, and in certain other cases there specified, “it shall be lawful for the Court of Chancery to direct any person, whom such Court may think proper to appoint for that purpose in the place of the trustee or heir, to convey such land to such person, and in such manner as the said Court shall think proper.” Now, it is contended, that the Court of Chancery has discovered who is the heir, or at least has appointed a person in his place, for the purpose of discharging his trusts, under the power which that Court has to make such appointments, in order that proper conveyances, where necessary, should be

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effected. Section 2, which is the interpretation clause enacts that the provisions of the act shall extend to land whatever tenure; and it is contended that those terms explained by a subsequent statute clearly include copyhold lands, and therefore that a statutory power is given by the act to direct surrenders and admittances to copyhold land where necessary. But, supposing that to be so, I cannot discover why the Court of Chancery should not make the order now applied for, as the express object of section 8 is that a person should be appointed in order to make conveyances. If surrenders of copyholds are included in the term, that Court must have full and express power to carry the section into effect. It seems to me, therefore, that it is not for this Court to interfere in an incidental part (as it were) of the suit, which is before the Court of Chancery but that we ought to leave that Court to make all such orders as are necessary for carrying into effect section 8 in all cases where they have thought right to appoint a person as a substituted heir. I do not think it necessary that power to make such orders should be expressly given to that Court, for, when the statute enabled them to substitute an heir, for the purpose of carrying trusts into effect, must be implied that they had also the incidental power of directing such conveyances as should be found necessary for the trust. But if it were necessary I think under a clause enabling them to direct a conveyance express power is given to make such an order as is now asked for from this Court. We think, therefore, that we ought to leave the matter to a jurisdiction much more competent to inquire than ourselves, and where the different conflicting interests may be thoroughly investigated.

LITTLEDALE J.—It is much to be regretted that this Court has ever interfered by mandamus to direct admittances to copyholds, which is a practice that has grown only of late years. The first instance in which the power

is recognized is in *Rex v. Rennett* (a), where the Court held that in a proper case they would compel the lord of a manor to admit a copyholder, and in a previous case, *Rex v. The Borough of Midhurst* (b), the Court of King's Bench had granted a mandamus to the homage to present certain conveyances, which amounted perhaps to the same thing. But it seems to me the Court of Chancery has the original jurisdiction over these matters. It was formerly a doubt, as appears by *Scriven on Copyholds*, whether the lord of a manor could be compelled to accept a surrender, but, on reading the different cases he cites, I feel no doubt that he can, and that the Court of Chancery is the proper court to be applied to, on their original jurisdiction. That Court is a much fitter tribunal to investigate these matters, and to ascertain whether they would compel the lord of the manor to accept this surrender. This very case is one of much difficulty, and requires investigation. The lord of the manor has no means of ascertaining what the title of Sir *Henry Baker* is, who is a complete stranger to him, and he has himself been in possession of the land for eighteen or nineteen years. On the whole it appears to me that, as the application is novel, it is much better to leave the matter to the Court of Chancery.

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PATTESON J.—The ground of the present application is that we are asked to consider Mr. *Goodrich* as the heir-at-law of the last trustee; if he is not to be so considered, we clearly have no power to interfere. It is only in recent times that this Court has exercised the power which it always possessed of compelling the lord of a manor to admit a tenant, but it never has compelled a surrender to be accepted, except from the tenant last on the rolls, or from his heir. Now it may be conceded that accepting a surrender from Mr. *Goodrich* would not have the effect of putting any one in possession, because it is undoubted that an heir may

(a) 2 T. R. 197.

(b) 1 Wils. 283.

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surrender before admission, and therefore, if Mr. G is to be looked upon as heir, his surrenderee would pay the same fine and observe the same rules on admission as any other tenant, and therefore the lord's rights were preserved. But the difficulty, which I confess I am unable to consider Mr. *Goodrich* as the heir-at-law. If however it is by the operation of the 11 *Geo. 4* and 1 *Will. 4* s. 8, which applies to trusts only, and to matters under the exclusive jurisdiction of courts of equity, and that it is difficult for this Court to interfere at all. That does not give the person appointed the legal estate absolutely, but only enables him, under the order of the Court of Chancery, to convey in such manner as that Court may think proper. But, unless we can say that the effect of these words is to give him the legal estate absolutely, we clearly have no power to interfere. The party is not without a remedy, because the Court of Chancery has the compulsory power that we have, supposing us to have no power at all.

WILLIAMS J.—The question is, whether any case has been made out for the interference of this Court? I think there has not, for the act creates a special jurisdiction for the Court of Chancery, and, even if that be not expressed in terms or impliedly, there is the original jurisdiction of that Court, which is capable of affording a more complete remedy than can be obtained in this Court.

Rule discharged



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Thursday,
May 30th.

EARLE v. BROWNE.

SIR W. W. Follett, in Trinity term last, had obtained a rule calling upon the plaintiff to shew cause why the annuity deeds of the 13th February, 1835, and the 6th May, 1837, together with a warrant of attorney and a judgment thereon, and a power of attorney given by the defendant to the plaintiff, empowering him to receive the pension of the defendant of 500*l.* per annum, and all other deeds given to secure the said annuities should not be set aside.

By the affidavits, on which this rule was obtained, it appeared that the defendant in February, 1835, in consideration of 1200*l.* granted the plaintiff an annuity of 180*l.*, and assigned a pension of 500*l.* granted to him by government as compensation for the loss of the office of cocket writer at the Custom-house. In the year 1837, the defendant applied to the plaintiff to reduce the amount of the above annuity, which the plaintiff consented to, and on the 6th May, 1837, a further deed, dated 6th May, 1837, was executed by the defendant and by the plaintiff, by which the plaintiff covenanted with the defendant to accept an annuity of 150*l.* in lieu of the former annuity of 180*l.*, and the defendant, in consideration of such reduction, covenanted not to redeem the said annuity before the 10th April, 1842, and it was declared by the deed that the securities of the 13th February, 1835, for the annuity of 180*l.* should be the securities for the annuity of 150*l.*, in the same manner as if the said annuity of 150*l.* had been granted by the securities of 13th February, 1835. The affidavits then set out the memorial of the annuity deeds of February, 1835, and stated that no memorial of the deed of the 6th May, 1837, had been enrolled.

Other objections were raised on the affidavits, relating to the consideration being withheld, which it is not necessary further to mention.

It was then held, that the deed of 1837 and all the securities of 1835 to be set aside.

In 1835 the defendant granted to the plaintiff an annuity of 180*l.* with a warrant of attorney to confess judgment, and other securities. Judgment was entered up, and all the deeds duly enrolled under 53 Geo. 3, c. 141. In May, 1837, another deed was executed by the plaintiff and defendant, by which the plaintiff covenanted to accept an annuity of 150*l.* in lieu of the former annuity, and in consideration thereof the defendant covenanted not to redeem the annuity for five years, and it was declared by the deed that the securities for the annuity of 1835 should be securities for the annuity of 1837.—Held, that the deed of 1837 ought to have

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Erle (with whom was *Miller*) now shewed cause. The objection, that a memorial should have been made of the deed of May, 1837, cannot be supported. The 53 Geo. 3, c. 141, s. 2, requires a memorial of the date of every deed whereby an annuity shall be granted, with the pecuniary consideration and names of witnesses; but the deed of May, 1837, was not the grant of an annuity, it was a mere covenant to accept a smaller sum than the annuity originally granted in 1835. It has been often held, that an instrument operating by way of further charge need not be enrolled, thus in *Aston v. Gwinnell* (a), where the grantor granted two annuities which were duly enrolled, and afterwards granted another annuity to the same party, by which he further secured the two first annuities, it was held that the memorial of the last annuity need not notice the further securities given for the first. It would be a rigid construction of the act to apply the words to a case like the present; especially as sect. 10 exempts from the necessity of enrolment all cases where the consideration is not pecuniary, for it is manifest the consideration of this annuity was, that it should not be made redeemable for five years.

Kelly (with whom was *A. Dowling*) contra. It is not disputed that the grantor of an annuity may give as many further charges as he pleases, and that such additional securities need not be enrolled, but, in the present case, the defendant granted a fresh annuity of 150*l.* in May, 1837, of which there ought to have been a proper memorial. If this transaction were not to be held an entirely new contract the object of the act might be entirely defeated, for parties might execute deeds for the grant of an annuity of a certain kind, which might be enrolled, and afterwards by an indorsement on the back, or a fresh deed, create a different annuity altogether. The act requires the annual sum to be paid to be enrolled. What is the annual sum payable

(a) 3 Younge & J. 136.

here? Clearly 150*l.*, and the Court might have been asked to enforce its process to obtain the payment of that sum. The consideration for the annuity was the money previously advanced, not the clause as to the redemption, which was only the consideration for the grantee's consent to take a less sum. (He was then stopped by the Court.)

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LORD DENMAN C. J.—I think there is no doubt that there should have been a memorial of the fresh transaction. Unless an enrolment were made of a deed like the present, the act might be defeated altogether in the mode noticed in argument. Section 10 appeared at first to raise some doubt, whether this is a case in which the consideration was of the nature to require enrolment, but, on considering the clause attentively, it does not appear applicable to the present case. I think therefore that we are bound to set aside the annuity deeds, for the second deed of the 6th May is the real transaction.

LITLEDALE J.—If one annuity be substituted for another, there should be a memorial of the substituted annuity as well as the first.

PATTESON J.—On this application the deeds of the last annuity only should be set aside, for the first deeds were properly enrolled, and therefore will stand good.

Kelly. The application is to set aside all the deeds. The old securities are made securities for the new annuity, if the new annuity fails, all the securities must fail also. Those securities are expressly given to secure an annuity which is not valid at law, the defendant therefore is not bound to wait till execution is issued upon such securities, but may come at once to the Court and apply to set aside the judgment. [*Patteson J. Hammond v. Foster (a)* cer-

(a) 5 T. R. 635.

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tainly appears in your favour.] There an annuity after having been duly enrolled was redeemed, and afterwards the deeds were given as a security of a fresh loan of money, but were not enrolled, and the Court set aside the annuity and ordered all the deeds to be cancelled, although there was no objection to the original transaction. The reason is this, the Court will look to see if the object of the act is complied with, and will take care that the memorial shall give the information required of the real transaction.

Lord DENMAN C. J.—You have satisfied us that all the deeds must be cancelled. If a fresh agreement is come to between the parties, the whole transaction must be registered as it was then intended to subsist between the parties.

LITTLEDALE, PATTESON, and WILLIAMS Js, concurred.

Rule absolute.

DOE on the demises of GRAVES and another v. WELLS
and TROWBRIDGE.

Monday,
June 3rd.

1. A denial by parol of a landlord's title does not incur a forfeiture of a lease for years.

2. A demise in ejectment laid on a day on which the forfeiture of a lease was incurred, to commence from two days previous, is good.

EJECTMENT for cottages at Donhead St. Mary, in the county of Wilts, on demises of the 17th October, 1836, to commence from the previous 15th October. At the trial before *Patteson J.* at the Wiltshire summer assizes 1837, the following facts appeared. The ejectment was brought to recover a dwelling-house occupied by the defendant *Wells*, and two tenements occupied by tenants of the defendant *Trowbridge*. These premises had originally formed one tenement, belonging to Lord *Arundel* of Wardour, which by a lease dated 5th June, 1789, had been demised by him to one *William Scott* for a term of 99 years, if three persons therein named should so long live, at the annual rent of 6*d.* One of the lives was proved to be in being at the time of the trial. The reversion in fee of this tenement,

which had been converted by *Scott* into distinct dwellings, was purchased by *Graves*, the plaintiff, in 1823. At the time of the purchase *Scott* was dead, and the premises had come to his two grand-daughters, who were married to the defendants. The plaintiff proved that the defendant *Wells* had paid Dr. *Graves*' 1s. for two years quit rent, due at Michaelmas 1823, and relied upon a subsequent disclaimer of his title as a forfeiture of the term. He proved an application to the defendant *Wells* for the quit rents due at Michaelmas 1836, and a refusal by him to pay any, *Wells* stating that the property was his own. On the defendant *Trowbridge* being applied to by *Graves* at the same period for his quit rent, as an acknowledgment of the tenancy, he said, that he would "be damned" if he would pay, that it was his freehold, and that, if he caught *Graves* or any one else there, he would shoot him. This disclaimer was made on the 17th October, 1836. The counsel for the defendant contended, that a parol disclaimer could not operate as a forfeiture of an existing lease, and also that, as this disclaimer was made on the 17th October, the demise being laid on that day to commence from the previous 15th October, could not be supported. His lordship was of opinion, that if a tenant under a lease, on being applied to for rent, denied his landlord's title and claimed to hold the demise as his own property, it was not a forfeiture of the lease, but on being pressed with some authorities to the contrary, he directed the jury to find a verdict for the plaintiff against the defendant *Trowbridge* (a), reserving both points for the defendant.

A rule nisi having been obtained by *Crowder* in the ensuing Michaelmas term for a new trial, or a nonsuit,

Erle and *Barstow* now shewed cause. The objection, as to the day of the demise being laid on the same day on which the disclaimer was made, is answered by *Roe v.*

(a) The defendant *Wells* did not appear on the consent rule.

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Hersey (a), where the lessor of the plaintiff claiming descent from his ancestor, who died on the 1st of Jan at five o'clock in the morning, had laid the demise in ejectment on the same day, and the Court held, that though for some purposes there was no fraction of a day, yet it was a fiction in law, which was never to be resorted to when any injury to the parties accrued, and that the mere fact should not overturn the fiction in order to do justice. *Doe v. Cawdor (b)* may perhaps be relied upon to show that the disclaimer ought to be before the day of demise, whereas here the demise was to take effect on the 15th October, but in *Roe v. Hersey (a)* also the demise was on the 1st January, to hold from the 31st December last past. [Lord Denman C. J. We think that case points.]

II. With regard to the disclaimer itself, the law is laid down clearly in 4 *Bac. Abr.* 884 (7th ed.) "that any disclaimer by the lessee by which he disaffirms or impugns the title of his lessor occasions a forfeiture of the lease. For to allow a lease the law tacitly annexeth a condition, that, if the lessee do any thing that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. In every such act necessarily determines the relation of lord and tenant; since to claim under another, and at the same time to controvert his title, to hold under a lease and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency." On this principle it was held, in *Doe v. Flynn* that where a tenant of a term of years delivered up possession of the premises and of the lease, in fraud of his lord, to another party claiming title, it was a forfeiture of the term, and Lord Lyndhurst C. B. said, "if a tenant deliver up a title hostile to that of his landlord, it is a forfeiture of his term, and it is the same if he assists another party to set up such a claim." Lord Redesdale lays down

(a) 3 Wils. 274.

(c) 1 C. M. & R. 137.

(b) 1 C. M. & R. 398.

same proposition in *Hovenden v. Lord Annesley* (a), and considers it as undoubted law. There are several cases which decide that, when there has been a disclaimer, it operates as a waiver of a notice to quit, the principle being that such a disclaimer works a forfeiture; *Throgmorton v. Whelpdale* (b), *Doe v. Grubb* (c), *Doe v. Frowd* (d). [*Lit- tledale J.* In *Com. Dig.* Forfeiture (A 5), the instances are collected where acts of the tenant amount to a forfeiture, but there is no case of a mere parol disclaimer having that effect.] That will be the argument on the other side, but there is no ground for such a distinction. It is certainly laid down in *Co. Lit.* 251 a, that a forfeiture may be made by alienation either in *pais* or by matter of record, and, in enumerating the modes of alienating by record, he states that an attornment of record to a stranger is a forfeiture, but that an attornment in *pais* is not. But this distinction is clearly contrary to the decided cases: *Doe v. Sutherland* (e); and is unsupportable on principle, for what difference can there be between pleading an attornment to a stranger and acknowledging his title before 100 people? It is clear that any act done by the tenant in derogation of the landlord's title works a forfeiture; as in *Lord Dormer's ejectment* (f), where it was held that a feoffment by a termor was a forfeiture, although the term had been assigned to a trustee with a view to provide against forfeiture. In *Doe v. Stanion* (g) *Parke B.* commented on the rule laid down in *Throgmorton v. Whelpdale* (b), and *Doe v. Williams* (h), as to the cases where notice to quit is waived, viz. where the tenant has attorned to some other person or done some other act disclaiming to hold as tenant to the landlord; and he observed, "this rule is too narrow, and from subsequent cases it does not appear to be neces-

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(a) 2 Sch. & Lef. 625.

(b) Bull. N. P. 96 a.

(c) 10 B. & C. 816; S. C. 5
Ann. & R. 666.

(d) 4 Bing. 557.

(e) 4 A. & E. 784.

(f) 3 B. & C. 399 n.

(g) 1 M. & W. 635.

(h) Cowp. 622.

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sary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient." If a solemn disclaimer by parol does not cause a forfeiture of the lease, great hardship is thrown upon the landlord, for it may be repeated by the tenant constantly during a long term, and at the end of that time the landlord may be met by a body of evidence to shew that the fee is in the tenant. [*Littledale J.* He may at any time distrain or bring an action for the rent during the term.] He ought not to be driven to that. Another distinction perhaps may be attempted, viz. that in the present case there is a lease for years, and therefore that a parol disclaimer is not sufficient, even if it might be in the case of a lease from year to year; but there is no ground for the distinction. Some leases are required to be in writing by the Statute of Frauds, and so must every surrender of a lease, but that act has left the law of forfeiture as it was. On the same ground any disclaimer by a copyholder works a forfeiture, and both with regard to freeholds and copyholds the same principle operates, that the law will not allow the tenant in any manner to weaken his landlord's title. In *Sir John Braunches' case* (a) it appears that any wilful refusal by a copyholder to come to his lord's court is a forfeiture. It was even attempted, as appears by a case cited in *Anonymous* (b), to make the nonpayment of rent by a copyholder a forfeiture, but it was held that the denial should be wilful to have that effect, which is all that is now contended for. The only reason why forfeiture by matter of record occurs so much more frequently in the old books, is that, in former times, terms were generally for life, and tenancies for years were seldom created.

Crowder and Butt, contra. I. This is the first time in which it has been sought to make a mere parol disclaimer

(a) 1 Leon. 104.

(b) Godb. 142.

work a forfeiture. The cases which have been relied on are the ordinary cases, where a disclaimer has been held to dispense with notice to quit, but such cases are not connected with forfeiture at all, though the expression has been loosely used in some of them. The doctrine on which they proceed is that, when a tenant sets himself up hostilely to his landlord, he is not entitled to the benefit of the rule as to notice, which the Court has laid down for the protection of tenants. Forfeiture, on the other hand, arises from the rigid principles of the feudal law, and is not to be carried further than those principles require. In none of the books is it laid down that a mere disclaimer by parol operates a forfeiture, but in all of them the distinction is pointed out between a disclaimer of record, and by words only. The ground of the former only being a forfeiture is founded on the strict doctrine of estoppel. Thus, in 4 *Bac. Abr.* 884 (a), (Leases and Terms for Years) it is said, that an alienation in *pais* by the tenant incurs a forfeiture, but that it must be a complete alienation, and that therefore a feoffment without livery is insufficient. But surely a feoffment by a tenant is as strong a denial of his landlord's title as is to be found in the present case. So also in 3 *Bac. Abr.* 196 (a), (Estates), the necessity of a denial of the landlord's title being on record, in order to cause a forfeiture, is insisted on, "all other denials, that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, by our laws were rejected." In *Co. Lit.* 252 a, the same distinction is pointed out. [*Littledale J.* In 10 *Vin. Abr.* 382, Estate, (H b) pl. 24, it appears that in a writ of waste the tenant claimed fee, and it was found against him, and that he had only an estate for life, and yet it was no forfeiture, and *Rodes J.* said, that "the tenant shall not forfeit his estate in any action by claiming of the fee simple but in a *quid juris clamat*." Therefore, it is not even in all cases of denial of title by record that a

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forfeiture is incurred. Lord *Denman* C.J. What do you say to the case of *Doe v. Flynn (a)*?] There an act was done by the tenant who gave up the lease and possession in fraud of his landlord. It may be doubted also whether that case can be supported, for the distinction between a disclaimer of a landlord's title in pais, or by matter of record, and the cases on the subject, were not brought to the attention of the Court.

LORD DENMAN C.J.—I think *Doe v. Flynn (a)* is distinguishable on the ground pointed out, viz. that it turned upon the fraud of the tenant. If that case proceeds any further, I am not prepared to say that it can be sustained. All the other cases in the books of forfeiture by disclaimer have been by matter of record. In the cases where notice has been held to be dispensed with, the word forfeiture has been rashly used, for in them no forfeiture of estate is incurred, but proof of the denial by the tenant of his landlord's title is considered evidence of the tenancy having been put an end to by the parties. None of the cases come up to the present, and I feel strongly the danger of putting an end to the relation of landlord and tenant by a mere parol denial of title.

LITLEDALE J.—If in point of law the relation of landlord and tenant might be put an end to by parol, I do not think we could well look at the consequences. But I do not think a parol disclaimer is sufficient. In the vast number of cases collected in *Vin. Abr. Estate (H b) (I b)*, there is not one where an allusion is made to a forfeiture being created by parol. In the case in *Viner* cited from *Godb.* 105, pl. 124, where an attempt was made to construe a plea by a lessee for years claiming the reversion in fee as a forfeiture, it was repudiated.

PATTESON J.—There are many cases where a term from

(a) 1 C. M. & R. 137.

year to year has been forfeited by disclaimer, but those cases turn on the doctrine of waiver. It is clear that there could not be a disseisin by mere words, unless the case, mentioned in the old books, of disseisin by election be an exception (a). Here there has been no act done by the tenant, and to hold that there has been a forfeiture would not be warranted by any previous decision.

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WILLIAMS J. concurred.

Rule absolute.

(a) According to Litt. s. 233, a denial by tenant to pay a rent seck was a disseisin of the rent, but the denial must have been on the land. Co. Litt. 153 a, and was then only a disseisin at election. See *Blunden v. Baugh*, Cro. Car. 302; Butler's note (1), Co. Litt. 239 a. and Lord Mansfield's judgment in *Taylor v. Horde*, 1 Burr. 107.


GARDNER and others, Assignees of STRUTTON, a Bankrupt,  
v. MOULT and others, Public Officers of the Northern  
and Central Bank.

Tuesday,  
June 4th.

ASSUMPSIT for money had and received after *Strutton* became a bankrupt, to the use of the plaintiffs as assignees, and on an account stated with the plaintiffs. Several pleas were pleaded, which raised issues as to the date of the act of bankruptcy of *Strutton*, and of notice of it to the defendants. At the trial at the Liverpool summer assizes, 1837, before *Coltman J.*, it appeared that the action was brought to recover several sums of money paid to the Northern and Central Bank by *Strutton* after the defendants had had notice of the act of bankruptcy. The plaintiffs, in order to prove the date of the act of bankruptcy by *Strutton*, proved that, on the 5th May, 1836, the Directors of the Northern and Central Bank issued a fiat against him, and sent their attorney over to Chester, where *Strutton* resided, and where they had a branch bank, of which a Mr. *Hay* was the manager, in order to make inquiries of Mr. *Hay* respecting an act of bankruptcy. The attorney stated that Mr. *Hay* gave him infor-

Depositions made by a witness sent by the petitioning creditor to prove an act of bankruptcy before the commissioners, are admissible in evidence against the petitioning creditor in any subsequent action against him, although the witness is still living.

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mation of acts of bankruptcy by *Strutton*, upon which he requested Mr. *Hay* to go over to Manchester. On the 6th May the fiat was opened, and Mr. *Hay* was there examined by the commissioner and deposed to an act of bankruptcy on a particular day. The counsel for the defendants contended that this deposition was not admissible in evidence; that although it was not competent to the defendants to deny that a fiat had issued against *Strutton*, and that an act of bankruptcy had been committed, still that they were not bound by all the evidence given by any witness that might be called before the commissioners, the deposition being tendered to establish the date of the bankruptcy; the learned judge thought the deposition was admissible, and the verdict passed for the plaintiffs: his lordship gave the defendants leave to move to enter a nonsuit.

Sir *F. Pollock*, in the ensuing Michaelmas term, having obtained a rule nisi accordingly,

*Cresswell* and *Alexander* now shewed cause. The deposition of Mr. *Hay* was properly received in evidence. If a party has used an affidavit in any proceedings, he has adopted it, so as to make it admissible against him in any subsequent proceeding; for it amounts to an admission by the party himself, and therefore on principle the evidence ought to be received. But the authorities are direct on the point. In *Harmar v. Davis* (a) it was held that the petitioning creditor was estopped by his affidavit of debt from making use of a fact which came out in evidence in an action by the assignees against him, and shewed his debt did not amount to 100*l.*, and which therefore would have put an end to the commission. So in *Ledbetter v. Salt* (b) it was held that a similar affidavit of debt was conclusive evidence against the petitioning creditor. And in *Inglis v. Spence* (c) it was held that admissions of the plaintiffs' title as assignees by the defendants were admissible in evidence against them.

(a) 7 Taunt. 577.

(c) 1 C. M. &amp; R. 432.

(b) 4 Bing. 623.

*Watson v. Wace* (a) establishes the same principle, and in *Gervis v. The Grand Western Canal Company* (b), it was held that a supersedeas reciting that a commission of bankruptcy had issued on a day certain, was evidence to shew that the commission issued on that day.

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Sir *F. Pollock*, *Wightman* and *Cowling*, contra. It is admitted that the defendants are estopped from disputing that there has been a fiat and an act of bankruptcy, and the decided cases shew that the petitioning creditor is bound by his own evidence on the commission, but no decision establishes that the petitioning creditor is bound by all the facts a witness may swear to before the commissioners, and which he had no means of knowing beforehand. It has been said that any affidavit which a party has made use of on one occasion, may be brought forward against him on any other; but that is not so. [Lord *Denman* C. J. Surely what a party brings forward as the truth on one occasion may be used against him on another.] It is not in practice, and it seems contrary to principle that it should be, admissible. The witness who made the deposition was alive, and ought to have been called. And there is a clear distinction between an affidavit which a party knows the contents of before he brings it forward, and depositions of a witness, who may swear to facts with which the petitioning creditor may be wholly unacquainted, or who may even depose to a different act of bankruptcy from that on which the petition is founded. This distinction between depositions and an affidavit was clearly pointed out in the late case of *Brickill v. Hulse* (c). A question was there made whether an affidavit by a sheriff's officer, and which had been used by the sheriff on an interpleader rule, was evidence against the latter; and the case of *Rushworth v. The Countess of Pembroke* (d) was relied on, which decided

(a) 5 B. & C. 153; S. C. 7 D.  
& R. 633.

(b) 5 M. & S. 76.

(c) 2 N. & P. 426.

(d) Hardres, 472.

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that depositions of a living witness were inadmissible, but the Court held that it was admissible, and Lord *Denman* C. J. said, "Depositions in Chancery are very different proceedings from the affidavit in this case. The party who applies to a person to be a deponent has not the opportunity of examining. He is examined before the examiner, and then states what he thinks proper. The deposition is sealed up until it is made use of in Court. It is however a very different case where a party uses an affidavit, of the contents of which he is fully aware." And *Coleridge* J. pointed out the same distinction. These observations apply to the present case with the same force. [Lord *Denman* C. J. Does not the petitioning creditor act upon the depositions of the witnesses he brings forward?] The adoption of the consequences of a commission does not include all the previous steps, as appears by *Chambers v. Bernasconi* (a), where it was held that, although assignees were acting under the commission, and had enrolled the depositions of the witnesses, they were not admissible in evidence against them. *Atkins v. Humphreys* (b) is an additional authority that depositions used by a party in a suit in Chancery are not admissible against him in an action by another party.

LORD DENMAN C. J.—It appears to me that this deposition was clearly admissible against the defendants. The Northern and Central Bank send their attorney over to Chester in order to ascertain whether an act of bankruptcy had been committed by *Strutton*, and having obtained the necessary information from their district manager, Mr. *Hay*, they bring him over to Manchester, and procure him to attend before the commissioners, in order to depose to an act of bankruptcy; they therefore act upon and adopt his evidence, and I think, under the circumstances, his deposition is admissible in evidence against them. No doubt a party who brings forward evidence at *Nisi Prius* is not bound by all that a witness may say, because he does not know before—

(a) 1 C. M. &amp; R. 347.

(b) 1 Moo. &amp; Rob. 523.

what evidence may be given, or into what subjects the examination may be diverted, and so it is with depositions in Chancery. But when a company send their agent to make a statement on oath as to the date and commission of an act of bankruptcy, in order to found proceedings upon it, I think it is clearly admissible against them.

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ATTLEDALE J.—I think this deposition must be considered as if made by one of the defendants themselves. It must be acted upon it, and must be presumed to adopt it.

ATTESON J.—I do not at all wish to depart from the principle laid down in *Brickill v. Hulse* (a), which I think is clear and intelligible. But there is no magic in words, as has been often said, and on looking at this evidence I think it lies rather within what is called an affidavit than a deposition, though it bears the name of the latter. On issuing out a commission, the petitioning creditor has to take the initiative; he has to send witnesses before the commissioner, who tell the story, which they had previously told the petitioning creditor, and there is no cross-examination. It is therefore not at all like a deposition in Chancery, where the witness undergoes a strict examination, and may tell a deal more than the party who sent him was aware of. *Went v. Bernasconi* (b) is an authority against the defendants, for it was argued there that the depositions were admissible against the assignees, but it was never doubted they might be used against the petitioning creditor.

WILLIAMS J.—The question is, whether the attorney, who was employed by the defendants to prosecute a commission of bankruptcy, is not their deputed agent for that purpose, and whether the statements he procures to be made on that occasion are not, though not in degree yet in substance, to be considered as made by the principals themselves. I think they are. The extent to which they ought to apply

(a) 2 N. & P. 426.

(b) 1 C. M. & R. 347.

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is another question, and belongs to another tribunal, for it is not contended that the deposition is conclusive evidence. Although this is called a deposition, yet, as it was made in order to establish a specific fact, it has rather the characteristics of an affidavit, as regards the present question, and, therefore, the rule as to affidavits ought to apply.

Rule discharged.

Tuesday,  
June 4th.

ANDERTON and another, Executors of JAMES ANDERTON, the elder, v. ARROWSMITH, Executor of Sir RICHARD CLAYTON, Bart.

Where the defendant conveyed an estate to plaintiff with a covenant for quiet enjoyment, and also gave an indemnity bond with sureties against "all costs, claims, demands, damages and expenses whatsoever," the plaintiff having been obliged to pay divers sums for arrears of an annuity charged on the estate, sued the defendant on the bond to recover them back with interest; the jury found that the plaintiff had been negligent in

DEBT on an indemnity bond for 1910*l.*, the condition of which, after reciting that Sir *Richard Clayton*, by indentures of lease and release, had sold certain hereditaments to *James Anderton*, was, that if Sir *Richard Clayton*, and *L. B.* and *W. F.* (his two sureties), should indemnify and save harmless the said *James Anderton* the elder, his heirs &c. from all claims, demands, costs, charges, damages, and expenses whatsoever, which he might at any time bear, pay, incur, sustain, or be put unto, for or on account of any action or suit, either at law or in equity, at any time hereafter to be had, brought, &c., or for or by reason of the said *James Anderton* having paid the said Sir *Richard Clayton* the said sum of 1910*l.* for the purchase of the above-mentioned hereditaments &c., then the bond to be void.

The declaration, after setting out the above condition, averred that one *Thomas Wilson* had lawful right to enter upon the above-mentioned hereditaments for the arrears of an annuity previously granted by Sir *R. Clayton*, and that the said Sir *R. C.* and the above-mentioned sureties did not save harmless and indemnify the said *James Anderton*, and that therefore and in consequence of the premises the said

not suing the sureties on the bond at the time the payments were made:—Held, that this finding prevented the plaintiff from recovering the interest.

*James Anderton*, in order to prevent the said *Thomas Wilson* from recovering the arrears of the said annuity by process of law, was forced to pay a large sum of money, to wit, eight large sums of money, to wit, of 200*l.* each, parcel and in part payment of the said arrears &c., and by reason of the premises respectively the said *James Anderton*, during his lifetime, and the plaintiffs, as executors as aforeaid, since his death, have been deprived of and lost the said eight sums of 200*l.* each, from the said times of payment thereof respectively hitherto, and all interest, gains and profits, which they might and otherwise would have made and acquired from using and employing the same sums respectively.

The defendant having suffered judgment by default, a writ of inquiry was executed before *Coltman J.* at the Liverpool summer assizes, 1837.

It appeared that Sir *R. Clayton* had sold certain estates, in which he had a life interest, to Mr. *James Anderton*, and had given him the usual covenants for quiet enjoyment, and also the above bond of indemnity. Shortly after the sale it was discovered that a Mr. *Wilson*, to whom Sir *R. Clayton* had granted an annuity, had a charge on this property, as well as other estates in the possession of Sir *R. Clayton*, and *Anderton* was compelled to make several payments from time to time, amounting in the whole to 1019*l.*, his portion of the arrears due. The question was, whether his executors were entitled to recover interest on the money so paid from the respective times of payment. The plaintiffs gave evidence to shew that the payments made by *James Anderton* could not have been recovered at the time, for that Sir *R. Clayton*, shortly after the sale, had gone abroad, where he lived till his death in great distress, and that subsequently the sureties had become insolvent. The learned judge left it to the jury to say whether the plaintiffs had been guilty of negligence in not proceeding against the sureties before their insolvency, for that, if so, the plaintiffs

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were not entitled to recover the interest. The jury found that the plaintiffs and *James Anderton* had been guilty of negligence, and that they might have recovered from the sureties, whereupon the verdict was directed to be entered for 1645*l.* 18*s.* 6*d.*, being the total amount claimed, with leave to move to reduce the damages to 1019*l.* 1*s.* 9*d.*

*Alexander* having obtained a rule accordingly in the ensuing Michaelmas term,

*Cresswell* and *Cowling* now shewed cause. The question is, whether on the terms of the bond the plaintiffs may not recover interest by way of damages from the time of paying the different sums of money. It is not contended that, if this were a mere covenant to pay money on a certain day, interest would be recoverable, *Higgins v. Sargent* (a), but interest has been held to be recoverable under a common money bond, *Farquhar v. Morris* (b), and à fortiori in the present case, which is a contract of indemnity, and resembles the case of a purchase where the contract has gone off for want of a good title, in which case the purchaser is entitled to his deposit back with interest; *Flureau v. Thornhill* (c). So also interest is payable on mortgage money subsequently to the day of default, although there be no covenant to pay such interest; 1 *Wms. Saund.* 201 a, note (n), citing *Doran v. O'Reilly* (d). *Rigby v. M'Namara* (e), seems a strong authority for the plaintiff, for there Lord *Thurlow* C. allowed the sureties, under their indemnity bond, the sum which they had paid in satisfaction of the principal sum due from the principal obligor, together with interest upon it. It is laid down in *Viner's Abr.* 301, Penalty (A), "in many cases the Chancery will compel the obligee to take his principal with some reasonable consideration of his damages (quantum expediat)," which shews the reason why the bond is taken with a penalty in such cases

(a) 2 B. & C. 348; S. C. 3 D.  
& R. 613.

(b) 7 T. R. 124.

(c) 2 W. Bl. 1078.

(d) 5 Dow, 133.

(e) 2 Cox, 415.

to include all possible damages. It is clear, therefore, that a jury may give damages under such a bond as this, and they have done so here. The penalty being forfeited at common law, the party was always obliged to go into equity for relief, which he could only obtain on the condition of paying interest. The other side will probably rely upon the decisions in equity, but they proceed on different grounds. If a defendant seeks relief in equity from a bond, he is forced to pay interest, but if a plaintiff seeks relief, (as to come in under a creditor's bill,) then the Court will not allow him interest. In *Newman v. Auling* (a) Lord Hardwicke C. allowed the interest due on the arrears of an annuity to be recovered by the grantee, and in *Robinson v. Cumming* (b) the principle is laid down on what occasions interest is to be given. The tendency of modern legislation is to allow interest, 3 & 4 Will. 4, c. 42, 1 & 2 Vict. c. 110, and the decisions shew that, whenever the courts of equity would allow interest, courts of law will interfere and do the same; *Bonafous v. Rybot* (c), *Hellier v. Franklin* (d).

*Alexander*, contra, was to have supported the rule on the following morning, but was stopped, and

LORD DENMAN C. J. pronounced the judgment of the Court (e).—The question is, whether interest ought to be allowed on an indemnity bond given by the defendant's testator with sureties to the plaintiffs' testator against any claims on an estate sold by the former to the latter, the words of the condition being "all costs, claims, demands, damages, and expenses whatsoever." The jury found that the plaintiffs had been guilty of negligence in not applying to the sureties of the obligor, who were solvent, but a verdict was taken with interest, subject to the opinion of this Court whether it ought to stand to that amount.

(a) 3 Atk. 579.

(b) 2 Atk. 409.

(c) 3 Burr. 1371.

(d) 1 Stark. Ca. 291.

(e) Lord Denman C. J., *Little-  
dale, Patteson and Williams Js.*

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Mr. *Cowling* contended that the jury *might* give interest, and that, as they have done so, the Court has no right to take it away. But this is not the effect of what passed at *Nisi Prius*. The verdict was taken for interest only in case we should think that it ought to be allowed; we must therefore consider that question. And the learned counsel for the plaintiffs urged that in point of law they were undoubtedly entitled to it, as damages sustained from non-payment of the money. The negligence found by the jury (they said) made no difference, because defendant would equally have been required either to repay the money at once, if promptly obtained from the sureties, and so lose the advantage of placing it out at interest, or to pay interest upon it, if it were delayed. But assuming that interest might be recovered under the name of damages on a bond conditioned like this, we think that the negligence found by the jury makes all the difference in this question: if promptly obtained from the surety and promptly repaid out of defendant's estate, no interest might have become due at all, and we cannot say that that would not have been the most gainful course for defendant. Nay, it is not impossible that a party liable may keep his money ready at his bankers, to answer the call when made, and so lose interest upon it. To require him to pay interest on the same principal to a creditor whose negligence has caused that loss would plainly be unjust. And in this case we cannot see that the interest now claimed has been lost to plaintiffs by defendant's default rather than by their own negligence.

Rule absolute for reducing the damages found  
by 626*l.*, the whole amount of interest.



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The QUEEN, on the relation of HENRY ROGERS,  
v. BRIGHTWELL.

Thursday,  
June 6th.

FORMATION in the nature of a quo warranto against defendant for exercising the office of alderman in the city of Norwich.

At the trial before *Park J.*, at the Norfolk spring assizes, 1837, the following facts appeared:—On the 31st December, 1835, the forty-eight councillors for the city of Norwich assembled, under the 5 & 6 *Will.* 4, c. 76, to elect aldermen. *Foster*, a councillor, proposed a list of sixteen persons (whom the defendant was one), which he read from a written paper. Mr. *Bignold*, another councillor, objected to this list of sixteen, as being all of the same politics, and proposed two other names. On a vote being taken, 27 against 20 voted against *Bignold's* candidates. *Foster* then proposed his list of sixteen, upon which *Bignold* objected that the names should be put up singulatim. It appeared that there was nothing to prevent any councillor from proposing and voting for any other candidate in lieu of any one of the sixteen. The original list was however put to the vote and carried. The learned judge told the jury that, according to the decisions in *Rex v. Monday* (a) and *Rex v. Player* (b), it was a clear rule of law that each candidate should be proposed separately, and therefore that the election of the defendant as one of a batch was bad. The jury accordingly found a verdict for the crown, and the learned judge gave the defendant leave to move.

Sir J. Campbell A. G., in the ensuing Easter term, obtained a rule nisi to enter a verdict for the defendant, or for a new trial, against which

Sir W. W. Follett, Kelly and O'Malley, shewed cause, Hilary term last (c), and relied upon *Rex v. Monday* (a) and *Rex v. Player* (b).

(a) Cowp. 530.

(b) 3 B. & Ald. 707.

(c) Jan. 26th, before Lord Denman C. J., Littledale, Williams and Coleridge Js.

An election of aldermen by lists under the 5 & 6 *Will.* 4, c. 76, where each elector has the opportunity of objecting to any of the lists proposed, or of proposing and voting for any other candidate, is good.

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Sir *J. Campbell* A. G., *B. Andrews*, *Palmer* and *Byla*, contra, contended that the rule laid down in those cases did not apply where a certain number were to be elected on a particular day, and that in this case there was no discretion, as in *Rex v. Monday* (a) and *Rex v. Player* (b), whether there should be any election at all.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the facts, and the direction of the learned judge at the trial, his lordship continued thus:—The rule laid down in *Rex v. Monday* (a) and *Rex v. Player* (b) is properly applicable where an indefinite number of honorary freemen is to be elected. The reason is obvious. In that case the claim of each is essentially distinct, and his individual fitness or unfitness is alone to be determined. This cannot be done where electors are required to vote for or against many candidates at once. They may think it so desirable that *A.* should be a member of the corporation from respect and confidence in him, that his election would be cheaply purchased by receiving *B.* and *C.*, both of whom they may deem wholly unfit for the office, or on the other hand may think him so highly objectionable, that it is better to exclude a long list of well qualified persons than permit him to come among them. Every thing would therefore unavoidably run into bargain and compromise, where they would be obviously unnecessary and improper, and even inconsistent with the direct purpose of such an election, which need not take place at all, and which calls on the electors to exercise no other judgment than on the competency of each individual proposed. But it seems to me that when a certain number of persons is to be elected as an official body, that very principle is the only one that can reasonably be acted on. I may consider *A.* perfectly fit for one of the places to be filled, provided only that *B.* or *C.* should occupy another of them.

(a) Cowp. 530.

(b) 2 B. & Ald. 707.

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The point on which the voter must exercise his judgment is not whether *A.* would be a good alderman, but whether *A.* and others would form a good board of aldermen. The proposer of the list lays it before the assembly as the board which he recommends. Each elector had the opportunity of proposing his own board, or each those persons who ought in his opinion to be elected at all events, whatever others may find a seat there.

Defendant's counsel contended that, by taking the votes for individuals singly, the purpose of the election might be wholly defeated, as there might be no majority in favour of any one, though there was one in favour of the definite number. But it is possible that there might be an equality of votes for two or any other number of the candidates in the list; the probability is less, but that is all.

On the part of the crown, it was also asserted that the nomination and election of a member of parliament, the most solemn form of election known to our law, proceeds always on the single-handed rule. This is hardly true as a practical proposition, for though the nomination is separate and the shew of hands taken on each, which may be final, it is not necessarily final. The freeholder who nominates *A.* in hopes that *B.* will be his colleague is free to ask for a poll, and vote against *A.* if he sees that *B.* cannot succeed, and that *A.*'s colleague will neutralize *A.*'s services, or make him an objectionable member. If the election is decided by the poll, every voter has the power of giving in his list, and does give it in by voting for 4, 3, 2, or only 1, if he thinks proper. This is precisely what was done in the election from which this quo warranto arose. The number of votes so taken affords a true measure of the confidence reposed in each and all the candidates by the whole body of voters.

The act of the 7 *Will.* 4 and 1 *Vict.* c. 78, which received the royal assent in July 1837, was passed after this election, and after this rule was obtained. It cannot there-

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fore as a matter of law regulate what was then done. But the mode of election there enjoined by the legislature, to be observed hereafter and permanently, cannot be considered as opposed to the sound general principles for conducting similar elections; and the 14th section makes the general law for the future in exact conformity with the practice observed when this defendant was elected.

Rule absolute.

*Friday,*  
*June 7th.*

*BENTALL v. SYDNEY, Knt.*


A clerk of the Petty Bag Office of the Court of Chancery, who attends at the trial of a cause under a subpoena duces tecum to produce the rolls of the Court, is entitled to a reasonable fee for each day's attendance, for, although he attends personally in pursuance of the subpoena, he produces the rolls of the Court solely under the order of the Master of the Rolls, who

**DEBT** for 3*l.* 11*s.*, owing to the plaintiff as senior clerk of the Petty Bag of the Court of Chancery, for the work and labour and attendances of the plaintiff, with divers rolls and books, containing the inrolment of the admission of solicitors of the Court of Chancery aforesaid, and other records, before that time made and bestowed by the plaintiff, as such senior clerk, in his majesty's Court of King's Bench at Westminster, at the request of the defendant. There were also counts for work done, money paid, and on an account stated. Pleas; 1, *nunquam indebitatus*; 2, as to 1*l.* 13*s.*, parcel &c., payment of that sum in full satisfaction and discharge of the causes of action as to 1*l.* 13*s.* parcel &c.

At the trial before *Littledale J.*, at the sittings after Trinity term, 1837, it appeared that the action was brought by the plaintiff, under the circumstances more fully set out in the judgment, to recover the balance of 3*l.* 11*s.*, according to the following particulars of demand:

may annex a fee to the production of the rolls; and, if a party chooses to require the production of the rolls, he is bound to pay a reasonable fee imposed by the Master of the Rolls, and this, whether he is aware of the rules of the office requiring such fee or not.

The clerk of the Petty Bag Office, in whose custody the rolls of Chancery are, is entitled to recover for attendances in court with the rolls, although he does not personally attend himself.

| 1836.                                                                                                                                                      | £  | s. | d. | 1839.                                                                                          |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|----|----|----|------------------------------------------------------------------------------------------------|
| June 13th, Petition, and paid for order of the Master of the Rolls to produce the Solicitors' Rolls on trial in the Court of King's Bench at Westminster . | 0  | 12 | 0  | <br>BENTALL |
| — 14th, Attending the Court of King's Bench with three books . . . . .                                                                                     | 1  | 1  | 0  | n.<br>SYDNEY.                                                                                  |
| Paid cab hire and back with books . . . . .                                                                                                                | 0  | 2  | 0  |                                                                                                |
| — 15th, The like . . . . .                                                                                                                                 | 1  | 3  | 0  |                                                                                                |
| — 16th, The like . . . . .                                                                                                                                 | 1  | 3  | 0  |                                                                                                |
| — 17th, The like . . . . .                                                                                                                                 | 1  | 3  | 0  |                                                                                                |
|                                                                                                                                                            | 5  | 4  | 0  |                                                                                                |
| Received on account . . . . .                                                                                                                              | 1  | 13 | 0  |                                                                                                |
|                                                                                                                                                            | £3 | 11 | 0  |                                                                                                |

It appeared that the defendant, being desirous of producing the roll of solicitors in the Court of Chancery, at the trial of a cause at Westminster, between *Hill v. Sydney* (a), served the plaintiff with a *subpœna duces tecum* to produce the roll of Chancery solicitors, and paid him 1*l.* 1*s.* on service. The plaintiff stated that the rolls could not be produced without an order from the Master of the Rolls, for which a fee of 12*s.* would be required, and which the defendant paid. The plaintiff claimed 1*l.* 1*s.* a day for each day's attendance at Westminster, with 2*s.* for cab hire, and it was proved that the rolls consisted of three large volumes, which required such conveyance. Verdict for the plaintiff, subject to a motion for a nonsuit.

*Kelly* having obtained a rule accordingly, on the authority of *Collins v. Godefroy* (b),

Sir *F. Pollock* and *Hoggins* shewed cause in Easter term last (c).

*Kelly*, contra, relied on the above case.  
*Cur. adv. vult.*

(a) See the case 3 N. & P. 161. man C. J., *Littledale, Patteson* and  
(b) 1 B. & Ad. 950. *Coleridge, Js.*  
(c) May 2nd, before Lord Den-

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Lord DENMAN C.J. now delivered the judgment of the Court.—At the trial of this cause before my brother *Lit-  
tledale*, it appeared that the defendant was desirous of having the rolls of the Court of Chancery to give in evidence in a cause of *Hill v. Sydney*, and he applied to the plaintiff, who was the senior clerk in the Petty Bag Office, to get an order from the Master of the Rolls for their production, which order the plaintiff procured. The plaintiff was served with a subpoena duces tecum to produce these rolls on the trial of the cause, which was set down for the 14th June, on which and the three following days one of the clerks in the Petty Bag Office attended the Court of Queen's Bench. On the last of those days the cause was tried, and the rolls were produced by the clerk, and put in evidence. The rolls were contained in three folio volumes, more than he could well carry from Chancery Lane to Westminster, and he carried them backwards and forwards in a coach. In the office of the Petty Bag the ordinary common law business of the Court of Chancery is transacted. There are three principal clerks in the Petty Bag Office, and they have no salaries, but are paid by fees: they jointly appoint a deputy clerk, who has a fixed salary, and he appoints clerks who are paid by him. The plaintiff is the senior of the three principal clerks, and as such he is entitled to the custody of the rolls in the Court of Chancery. It is the official business of the plaintiff to produce the rolls by himself or his clerk, generally by his clerk, and that business belongs exclusively to him, and he alone receives all the fees and emoluments which arise in respect of it; but some branches of the business of the Petty Bag are paid by fees, which are divided amongst the three principal clerks.

When the subpoena was served and order obtained, one guinea was paid for attendance and 12s. for the order: and the sum which the plaintiff sought to recover in this action was three guineas for three days' further attendance after the first day, and 8s., being 2s. a day for four days' coach

The clerk saw the defendant at his office the first day: the clerk asked the defendant if he was to attend on the next day: the defendant said, "certainly." The clerk asked the defendant for the fees for the next day's attendance. The defendant said there was a great probability of not being tried that day, but it would be the following day, and that the fees should then be paid altogether. The clerk at a subsequent time told the defendant that the judge had desired him to say that if he, the defendant, paid the plaintiff the fees claimed, the plaintiff would pay his costs. The defendant said, if Mr. *Bentall* had to have waited till the cause of *Hill and Randall* was settled, that then the fees would have been paid. It was only on that principle that he resisted.

It appeared that in the year 1743 Lord *Hardwicke*, then Chancellor, made orders as to fees in the offices in the Court of Chancery, and amongst those in the Petty Bag there was a direction, "For attending with any person out of the office the clerk attending is to be paid a reasonable fee, according to the time of such attendance." It was given that for between forty and fifty years a day had been regularly paid for attending a court of records, and it had occurred hundreds of times, and had been known to be resisted but once.

*Kelly* applied for a nonsuit, which my learned brother gave him leave to move for. The rule was argued last day and it was urged, on the part of the defendant, that the rule must be governed by *Collins v. Godefroy* (a), where the Court held, upon a review of the cases and the construction of the statute of 5 *Eliz.* ch. 9, sect. 12, that an action does not lie for compensation to a witness for loss of attendance upon a subpoena; though the plaintiff was an attorney, and contended that, he being a professional man, the rule ought not to apply to him.

It was also contended that the subsequent promise to

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pay made no difference, if there was no original consideration for the demand, as was held in *Collins v. Godefroy* (a), and that Lord *Hardwicke* had no right to impose a fee by which the king's subjects could be bound, and that, if he had such right, the defendant ought to have had notice of the fee: and that, as the plaintiff accepted service of the subpoena without telling the defendant that he did not consider himself bound by the common obligation of the service of the subpoena, but that he should require payment according to Lord *Hardwicke's* order, he cannot now insist that he stands on a different footing from any person who is served with a subpoena. And it was also contended that the plaintiff, not having personally attended on the production of the rolls, is not entitled to the fee.

We think that the rolls of the Court of Chancery cannot be taken out of the court to be given in evidence as a matter of course, and that neither the Master of the Rolls, nor the plaintiff, as the senior clerk in the Petty Bag Office, would be compellable to produce them on a subpoena alone, but there must be an order of the Master of the Rolls for that purpose. These records are open to public inspection, and any body wishing for a copy of them may have it in the usual way upon paying for it, or a party may, if he prefers, apply to the Master of the Rolls for an order that the rolls themselves should be produced, and he is in the habit of granting such orders, but he would not suffer the rolls to be carried out of the office by any body but one of the officers of the court. And it is not reasonable that the officers of the Court should leave their duties for the purpose of carrying these rolls wherever a party in a cause may wish, without being paid for their trouble and attendance. And whether Lord *Hardwicke* had a right to constitute *legal* fees by his orders or not, yet this was a fee which was so far optional with those who wanted the records out of the office, that, as they were not entitled to have them out of the office of right, but only on an applica-

(a) 1 B. & Ad. 950.

tion to the Master of the Rolls, if they chose to have them, they were bound to pay for them a reasonable fee, according to the terms imposed by Lord *Hardwicke*.

These orders of Lord *Hardwicke* of 1743 are stated in *Leames'* Orders in Chancery, 369, and the part which relates to a clerk of the Petty Bag Office attending with the cords is in p. 404.

The obligation to attend the Court arises no doubt from the subpoena; but that subpoena is served upon a person who, in the ordinary course of things, is not primarily bound to attend to it: it originates with the Master of the Rolls, and he or the Chancellor may very reasonably say that he will not grant an order for the carrying the rolls to and fro unless the officers are paid for their trouble: and we think we are not to confine the necessity of obeying the subpoena to the service, as in *Collins v. Godefroy (a)*; but we must also look to the order of the Master of the Rolls. We think it not necessary that the defendant should have had notice of any order of the Chancellor as to a remuneration to the officer of the Petty Bag. If a defendant, instead of applying for an examined copy of such part of the rolls as he wants, chooses to get an order for their production, he must be supposed to be cognizant of the rules of the office in that respect, and which, independent of Lord *Hardwicke's* order, has prevailed between forty and fifty years; and there was no necessity for the plaintiff to inform him that he relied upon the order of the Master of the Rolls, and did not consider himself bound by the obligation of the subpoena as in ordinary cases; and the statements of the defendant on two occasions are quite sufficient to shew that he was acquainted with the custom of the office. We think it no objection to the plaintiff's right to recover, that he did not personally attend: according to the custom of the office, the duty of producing the records was cast upon him, but there was nothing personally requiring his attendance: it was the same thing whether one of the clerks or

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(a) 1 B. &amp; Ad. 950.

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another had the custody of the rolls to produce, as long as they were in the keeping of the officers of the Court of Chancery. In fact the plaintiff scarcely ever personally attended; but the fee was due to the plaintiff, whichever of the clerks attended. Indeed it is singular enough, as to the Petty Bag, that if issue be joined the Chancellor delivers the record with his own hands to the King's Bench, to be there tried: 4 Inst. 80, 1 Eq. Cas. Abr. 128. But, if the record be delivered by the clerk of the Petty Bag, it will be well removed, for that may be said to be *a propria manu* of the Chancellor, which is done by his officer: 1 Eq. Cas. Abr. 128, 129.

We think therefore this case does not fall within *Collins v. Godefroy(a)*; for the plaintiff does not attend merely in consequence of the subpoena, for that alone would not have been sufficient to compel him to produce the rolls, but he attends in consequence of the order of the Master of the Rolls and the subpoena together; and we think that the plaintiff is entitled to recover a reasonable compensation for his attendance on the production of the rolls. The rule therefore must be discharged.

Rule discharged.

(a) 1 B. & Ad. 950.

Friday,  
June 7th.

WILLIAMS v. BURGESS and Another.

The plaintiff sold the defendants a mare for 20*l.*, on condition that if she should prove

with foal the defendants should re-deliver her on payment by the plaintiff of 12*l.* The defendants accepted the mare; but refused to re-deliver her, on proving with foal, for 12*l.*:—Held, in an action for not re-delivering, that the contract did not amount to two contracts, one of sale and the other of re-sale, but was one conditional contract, as the same thing was to be re-delivered which had been accepted by the defendants, and that their acceptance was sufficient to take the case out of the 17th section of the statute of frauds.

**ASSUMPSIT.** The declaration stated, that whereas on &c. in consideration that the plaintiff, at the request of the defendants, would sell and deliver to the defendants a certain mare of the plaintiff's, which the plaintiff then supposed to

be in foal, for a certain price, to wit, 20*l.*, subject to a certain condition in that behalf, that is to say, that, if the said mare should prove to be in foal, they, the defendants, should, on the request of the plaintiff, and on payment to them by the plaintiff of 12*l.*, return and redeliver the said mare to the plaintiff, they, the defendants, promised the plaintiff that they would, if the mare should prove in foal, on the request of the plaintiff, and on payment to them of 12*l.*, faithfully observe the said condition, and return to the plaintiff the mare. Averment of the sale and delivery by the plaintiff, that the mare shortly afterwards proved to be with foal, and plaintiff tendered the 12*l.* and requested the mare to be returned, which the defendants refused.

Plea, the general issue, on which the defendant *Burgess* joined issue, the other defendant suffering judgment by default.

On the trial, before *Parke B.*, at the York summer assizes, 1837, the case was proved as alleged in the declaration. It was then objected for the defendant that the contract, for the breach of which the action was brought, amounted to a contract of resale; and that, as it amounted to the sale of goods of the value of 10*l.*, it required a note in writing by 29 *Car. 2*, c. 3, s. 17. The learned baron was of opinion that the agreement to return the mare, if she proved with foal, was part of an entire contract, which had been executed, so that the case was not within the statute. Leave was reserved to enter a nonsuit on this point, if the Court should be of the contrary opinion, and it was left open to the plaintiff to object that the point could not be taken under the general issue. Verdict for the plaintiff.

A rule nisi having been obtained in the following Michaelmas term,

*Alexander* now shewed cause. The promise to redeliver the mare was a mere qualification of the original contract, which was executed by the delivery and payment of the price, so that the case is excepted from the operation of 29

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*Car. 2, c. 3, s. 17.* The law on this point is to be found in *Phillips v. Bistolli* (a), *Smith v. Surman* (b), *Hanson v. Armitage* (c), and *Tempest v. Fitzgerald*, (d), all which cases are consistent with the position, that the contract in this case was executed. [*Knowles*. No question will arise on that part of the case, but it is contended that there are two contracts, and that the contract of redelivery has not been executed, so that it is not taken out of the statute.] The identical thing sold was to be returned on certain conditions. In *Watts v. Friend* (e), the plaintiff agreed to supply the defendant with a quantity of turnip-seed, which the defendant was to sow on his own land, and sell and deliver the whole of the seed produced therefrom to the plaintiff at a price agreed upon. The plaintiff supplied the seed, which the defendant sowed, but he afterwards refused to sell the produce to the plaintiff, and, as it amounted to 10*l.* in value, the contract was held to be within the statute. But there the contract was to sell a different thing from that which had been delivered by the plaintiff. Here the contract was to sell the same thing which was to be returned conditionally, and there was an actual delivery, *Elmore v. Stone* (f), *Chaplin v. Rogers* (g).

It is unnecessary to argue as to the admissibility of the objection, under the general issue, as the point is now before this Court in *Jones v. Flint* (h), and before the Court of Exchequer in *Buttermere v. Hayes* (i).

*Knowles*, contra. The question is not whether there was a sufficient delivery, but whether there were not two distinct contracts, one of sale and the other of resale. If there were two contracts, there should have been a note in writing of the contract of resale, as there could not have

(a) 2 B. & C. 511; S. C. 3 D. & R. 822.

(b) 9 B. & C. 561; S. C. 4 Mann. & R. 455.

(c) 5 B. & Ald. 577; S. C. 1 D. & R. 128.

(d) 3 B. & Ald. 680.

(e) 10 B. & C. 446; S. C. 5 Mann. & R. 439.

(f) 1 Taunt. 458.

(g) 1 East, 192.

(h) *Post*, in the sittings after term.

(i) Not yet reported.

any delivery under that. [*Littledale J.* Suppose the contract had been in writing, and required a stamp, two stamps have been necessary?] It is not necessary to go that length. The contract may be good for that as to which the statute has been observed, and bad for the other part, as in *Wood v. Benson (a)*. Suppose the contract related to two horses—that on the mare proving with the defendants were, on receipt of 12*l.*, to give the plaintiff another horse; that part of the contract would be good under the statute. There is no difference between such a contract and the giving the plaintiff a foal on the terms depending upon. Again, suppose the position of the parties to be reversed, and that the defendants sued the plaintiff for refusing to take back the mare and to pay 12*l.*, the defendants would fail for want of a note in writing, for the plaintiff would then be in the position of the buyer, and there would have been no acceptance by him so as to satisfy the statute. The acceptance under one contract could not be deemed an acceptance under the other. There is no inequality, therefore, if one party is to have a right of enforcing the contract which the other has not. In *Watts v. Watts (b)* the plaintiff agreed to *supply* turnip-seed, the price of which the defendant was to sell to the plaintiff. The only difference between that case and the present is, that the plaintiff there agreed to *supply* instead of to *sell*, but that difference could not affect the ground of decision, which was that the acceptance originally did not satisfy the statute with respect to that part of the contract which was to be performed by the defendant.

On the other point on the pleadings is before the Court in the other case, it is unnecessary to argue it now; but it may be observed that the phraseology in section 17 of the Statute of Frauds is not the same as in other sections; it does not say that the contract which does not comply with its provisions, shall be “void,” but merely that it shall be allowed to be good.”

<sup>a</sup> 2 Tyrr. 93; S. C. 2 C. & J. (b) 10 B. & C. 446; S. C. 5 Mann. & R. 439.

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LORD DENMAN C. J.—It is not necessary to consider the question whether the Statute of Frauds must be pleaded specially. This is the case of one entire conditional contract, which is exempted from the operation of that statute by the acceptance under it. In *Watts v. Friend* (a) the defendant had not, under his contract, to deliver the same thing which he had accepted from the plaintiff.

LITTLEDALE J.—This is an entire contract, and the condition was part of it. There is no contract for resale of the mare, but merely for taking it back on certain terms. It resembles, in this respect, the case of a horse sold on trial, and if found, within a specified time, to have certain defects, to be returned, on the plaintiff paying back part of the purchase money. If a stamp were necessary at all to an agreement on a sale of this kind, one stamp would have been enough.

PATERSON J.—I am of the same opinion. There was no contract for resale in this case; it was for a sale on the terms of returning the mare, if she proved with foal, on the plaintiff returning part of the price. The tests suggested by the defendants' counsel do not present any difficulty to my mind. It was said, first, suppose the thing to be delivered by the defendant had been different from the thing accepted by him? The answer is, it was the same thing. It was said, secondly, suppose the case had been reversed, and that the defendant sued the plaintiff? If it had been so, the defendant would have had merely to state the actual circumstances of the case, and the action would have been sustainable by him. In *Watts v. Friend* (a) the thing to be sold by the defendant was different from that of which there had been an acceptance by him; and *Wood v. Benson* (b) establishes nothing more than that there may be two contracts, one good and the other bad, on the same piece of paper.

WILLIAMS J. concurred.

Rule discharged.

(a) 10 B. & C. 446; S. C. 5 Mann. & R. 439.

(b) 2 Tyrr. 93; S. C. 2 C. & J. 94.

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## GAREY v. PYKE.

for goods sold and delivered, for work and material on an account stated. Pleas: nunquam indebitatus off.

The trial before Lord *Denman* C. J., at the sittings of Michaelmas term, 1837, in London, it appeared that the plaintiff was brought to recover a tailor's bill, for clothes ordered to the defendant, and the plaintiff proved a delivery of the clothes in question. The defendant put in the following agreement, which was signed by both parties, and concluded that the plaintiff must be nonsuited:

"A memorandum of agreement, made this 31st day of December, 1835, between *Hugh Pyke*, of &c., law agent, and *G. D. Garey*, of &c., whereby the said *Hugh Pyke*, being in his capacity of law agent and agent enabled to advance the interests of persons engaged in commerce, hereby agrees, at the instance and request of the said *G. D. Garey*, to introduce a few of his friends and connexions as to the said *G. D. Garey*, upon the express condition that the said *G. D. Garey* agrees to allow to the said *Hugh Pyke*, for his said exertions, a fee of ten per cent. upon the gross amount of business and connexions generally introduced by or from him the said *Hugh Pyke* to the said *G. D. Garey*, and on any other connexion whereby be introduced through the medium of the aforesaid connexions and friends of the said *Hugh Pyke* to the said *G. D. Garey*, he be allowed a like fee of ten per cent.; and it is hereby understood that such allowance, remuneration or fee, is to be received by the said *Hugh Pyke* in clothes, to be ordered by him the said *Hugh Pyke*, from time to time, as he may want the same, and that a settlement of accounts between the said parties shall take place every six months, or at the farthest in twelve months."

The Lordship was of opinion that the plaintiff must be nonsuited, but directed the jury to find a verdict for the plaintiff for damages 30*l.* 16*s.*, giving the defendant leave to

*Campbell* A. G. having obtained a rule accordingly for the ensuing Hilary term, *Platt*, who was to have shewn cause, not being present, the Court desired to hear

whether it had been come to, and that no action lay till the expiration of

On proof of the delivery of clothes, in support of an indebitatus count for a tailor's bill, the defendant put in an agreement between himself and the plaintiff, by which it was agreed that the defendant should recommend customers to the plaintiff and receive a percentage on their accounts; such percentage to be received by the defendant in clothes, to be ordered from the plaintiff by the defendant from time to time as he might want the same, and that a settlement of accounts should take place between the parties every six months, or at the farthest in twelve months:—Held, on this agreement, that the onus lay on the plaintiff to prove that a settlement of accounts had taken place between the parties every six months, or at the farthest in twelve months.

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Sir *J. Campbell* A. G. and *Busby*, in support of the rule. The meaning of this agreement was, that there should be periodical accounts taken between the parties, at which times it is conceded that an indebitatus count would have been maintainable for any balance found due, but it never was contemplated that, immediately after the delivery of clothes to the defendant, the plaintiff might sue him for goods sold. It is evident that, although goods had been delivered to the defendant, the balance of accounts might have been in his favour. By the terms of the agreement, it appears that the goods are not to be paid for, but to be delivered in satisfaction. It is not, consequently, a case where a promise to pay money on request can be implied, and therefore the declaration should have been framed on the agreement.

*E. James*, contra. *Sheldon v. Cox* (a) is an authority for the plaintiff. There the plaintiff agreed to exchange a horse warranted sound for a horse of the defendant's, and a sum of money. The horses were exchanged, but the defendant refused to pay the money, pretending that the horse was not sound, and the Court held that indebitatus assumpsit would lie for the money. In the present case, it did not appear that the goods were delivered in pursuance of the agreement, or that any recommendations were in fact made by the defendant. For it will be observed that it is not specified that all clothes were to be delivered according to the terms of the agreement, but only that the per centage on any recommendations made should be received in clothes. It was therefore incumbent on the defendant to have shewn that he recommended customers to the plaintiff, so as to bring the clothes within the agreement.

Lord DENMAN C. J.—Although this agreement came out in evidence on the defendant's case, I think we must look upon it as the first thing proved between the parties.

(a) 3 B. & C. 420; S. C. 5 D. & R. 277.

Then on proof of clothes having been delivered to the defendant, the inference necessarily is that they were supplied under the agreement, and the plaintiff, in order to bring himself within the agreement, might very easily have supplied the proofs, if he really were entitled to sue.

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LITTLEDALE J.—If there had been no stipulation in the agreement as to the periodical balances to be struck, I should have thought the plaintiff was entitled to recover in this action. The agreement made by the defendant is to introduce his friends to the plaintiff, upon the express condition that the plaintiff is to allow the defendant a fee of ten per cent. upon the gross amount of all business introduced by him, such fee to be received by the defendant in clothes, to be ordered by the defendant from the plaintiff, and, if the agreement had stopped there, I think the plaintiff might have sued the defendant for any clothes delivered, and that it would have lain on the defendant to shew that such clothes were delivered to him as a fee and remuneration. But, inasmuch as the agreement specifies that there shall be a settlement of accounts between the parties every six or at farthest twelve months, I think it was incumbent on the plaintiff to shew that there had been such a settlement, and that it was not competent to him to bring an action at all till the end of twelve months.

PATTESON J.—On this record it lay on the plaintiff to shew that a debt existed. Without doubt, if no agreement existed, the proof of delivery of the goods would be sufficient. On the agreement being put in, it appeared that the defendant was to have a certain per centage in clothes, and perhaps, if it had stopped even there, and goods had been proved to have been delivered, the onus of proof would not have shifted, and the defendant might have been called upon to meet a *prima facie* case. But the agreement specifies that a settlement of accounts shall take place every twelve months, which shews that it was not intended that,

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as soon as clothes were delivered, exceeding by any small amount the commission due, an action should lie, but that the accounts of the parties should go on concurrently till the end of the year, when a final balance should be struck. No debt therefore existed till after a settlement, and it lay on the plaintiff to prove that a settlement had been come to.

WILLIAMS J.—The question lies in a narrow compass, viz. whether the defendant is indebted in the manner and form stated in the declaration, which alleges that the clothes were delivered to the defendant to be paid for on request. As soon, however, as the agreement is put in, it appears that the obligation to pay on request would only arise under special circumstances, and therefore it was incumbent on the plaintiff to prove that those circumstances had occurred.

Rule absolute for a nonsuit.

GEEEN v. CRESSWELL.

Tuesday,  
June 11th.

Where the defendant, an attorney, requested the plaintiff to execute a bail-bond to the sheriff for a client of the defendant, and promised to indemnify:—Held, that it was a promise to answer for the debt or default of another, within the 4th section of the Statute of Frauds.

THE declaration stated that on the 2d February, 1836, a writ of *capias ad respondendum* was issued against one *Hadley*, at the suit of *John Reay*, in an action on promises; that the writ was indorsed for bail for 35*l.*, and that the sheriff arrested *Hadley* under it, and that thereupon, in consideration that the plaintiff, at the request of the defendant, would become bail and surety for the said *Hadley*, and would as such bail and surety seal, and as his act and deed deliver to the said sheriff, his certain writing obligatory, commonly called a bail bond, in the penal sum of 70*l.* to be paid to the said sheriff &c., that the defendant then promised the plaintiff that he, the defendant, would save harmless and indemnify the plaintiff from all payments, damages, costs and expenses which the plaintiff should or might incur &c., by reason of so becoming bail for the said *Hadley*. Aver-

that the plaintiff did give to the sheriff his bail bond, that *Hadley* did not cause special bail to be put in above, by the said bail-bond was forfeited, and afterwards, on &c., was assigned by the sheriff to the said *Reay*, whereupon afterwards, to wit, on &c., commenced an action against the now plaintiff in the Court of Exchequer, recovered against the plaintiff 75*l.* 5*s.*, as well for &c. and, that *Reay* afterwards sued out a *fi. fa.* against the now plaintiff upon the said judgment, and that the defendant was obliged to pay 98*l.* 6*s.* to release his goods. and, that the defendant had not saved harmless and indemnified the plaintiff &c.

Issue: 1. Non assumpsit. 2. That the promise in default mentioned was a special promise to answer for the default of another person, and that there was no writing in writing, according to the statute in such case made and provided. Replication: That the said promise was a promise to answer for the debt or default of another person modo et formâ.

The trial at the Warwickshire Spring assizes 1837, before Mr. J., it appeared that one *Reay* having issued a *capias ad respondendum* against *Joseph Hadley*, the same was applied to the defendant, who was an attorney at Birmingham, and by the evidence of the plaintiff's witnesses the plaintiff agreed, at the request of the defendant, to give bail for *Hadley* to the sheriff, on the defendant's verbal promise to indemnify the plaintiff. The plaintiff contended that he executed the bail bond; that *Hadley* failed to give special bail; that the plaintiff was sued on the judgment, and that execution issued against him, on which he paid 98*l.* The counsel for the defendant contended that this was a promise within the Statute of Frauds, and called witnesses to prove that the defendant never did make the promise in fact. The jury found for the plaintiff damages 98*l.* The learned judge ruling that this was not a promise within the Statute of Frauds.

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*Goulburn Serjt.*, having obtained a rule for a new trial on the ground of misdirection,

*Balguy* shewed cause on a former day in this term (a), and relied on *Thomas v. Cook* (b), and the dictum of *Bayley J.* there, that the statute does not apply in cases of an indemnity, which is all that a bail bond amounts to. In this case *Hadley's* debt was due to *Reay*, and not to the plaintiff.

*Goulbourn Serjt.* and *Mellor* contra. The principle laid down by *Bayley J.* in *Thomas v. Cook* (b), is too general to be supported. *Anderson v. Hayman* (c) and *Matson v. Wharam* (d) were both contracts of indemnity, but the Court held that they were promises to answer for the debt or default of another. At one time it was thought that if there was no debt subsisting at the time, the statute did not apply, *Jones v. Cooper* (e); but in the two cases above cited it was held that there was no such distinction. It has also been sometimes said that, if there is a new consideration for the promise, it does not fall within the statute, but it is obvious that this distinction is not sound, for in all such promises there must be a new consideration, or it would be *nudum pactum*. The true rule is laid down by the last editors of *Wms.'s Saunders* (f), "whether each particular case comes within this clause of the statute or not depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." The inquiry, therefore, in this case must be, whether the original liability of *Hadley* remained after the bail bond was given. Now *Fisher*

(a) June 4th, before Lord Denman C. J., *Littledale, Patteson, and Williams, Js.*

(b) 8 B. & C. 728; S. C. 3 Mann. & R. 444.

(c) 1 H. Bl. 120.

(d) 2 T. R. 120.

(e) Cowp. 227.

(f) 1 Wms. Saund. 211, c. note (i).

*v. Fallows* (a) proves distinctly that, where a party becomes bail for another, the contract is, that “the principal engages to indemnify the bail from all expenses fairly arising from his situation as bail;” *Hadley* therefore was primarily liable. It is true that, if one bail procure another to join him as surety, with a promise to indemnify, the promise need not be in writing, because there is a primary liability in the party making the promise, and that must have been the ground of decision in *Thomas v. Cook* (b). [*Putteson* J. I do not see “whose debt or default” it could be in *Thomas v. Cook* (b) but the defendant’s own. His request to the plaintiff to join in the bond was founded on a consideration moving from himself.] That is so, and therefore all discussion on *Bayley* J.’s dictum is unnecessary. [Lord *Denman* C. J. The difference in this case is, that the defendant was neither principal nor co-surety.] A promise by a stranger for the debt or default of another is clearly within the statute. In *Buckmyr v. Darnall* (c), where the defendant promised that, in consideration the plaintiff would deliver a gelding to *J. E.*, *J. E.* should redeliver it; it was held to be a promise for another, and within the statute. In *Williams v. Leaper* (d) and *Edwards v. Kelly* (e), and that class of cases where there has been a promise to pay the debt of another, but it has been held, that the promise was original and not collateral, the ground of decision was, that the debt of the original debtor had been extinguished, and in *Thomas v. Williams* (f), where those cases were reviewed, the principle on which they were decided is pointed out. They also cited *Kirkham v. Marter* (g), *Fish v. Hutchinson* (h), and 1 Selw. N. P. 842 (9th ed.)

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the

(a) 5 Esp. 171.

(e) 6 Man. & S. 204.

(b) 8 B. & C. 728; S. C. 3 Mann. & R. 444.

(f) 10 B. & C. 644; S. C. 5 Mann. & R. 625.

(c) 2 Lord Raym. 1085.

(g) 2 B. & Ald. 613.

(d) 2 Wils. 308.

(h) 2 Wils. 94.

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Court. After stating the facts, his lordship continued as follows:—The promise in effect is, “If you will become bail for *Hadley*, and *Hadley*, by not paying or appearing forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If *Hadley* fails to do what is right towards you, I will do so instead of him.” If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another. The case most relied on by the plaintiff is that of *Thomas v. Cook (a)*, where this Court held, that a promise of *B.* to hold *A.* harmless against the consequences of his entering with *B.* and *C.*, at *B.*'s request, into a joint bond to indemnify *D.* against debts due from *C.* and *D.* was binding, though not in writing, *Bayley* and *Parke* Js., the only judges present, saying that a promise to indemnify does not fall within the words or policy of the statute.

But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down, which, taken in its full extent, would repeal the statute; for every promise to become answerable for the debt or default of another may be shaped as an indemnity; but even in that shape we cannot see why it may not be within the words of the statute.—Within the mischief of the statute it most certainly falls. *Adams v. Dansey (b)* does not bear out the general doctrine. That was a promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe. This is not becoming responsible for debt or default of any other, but merely promising to pay what the promisee may lose by defending the promisor's interest in a suit.

In some of the cases the language employed seems to assume that the debt, default or miscarriage, must have been incurred at the time of making the promise. But the common case of becoming responsible for goods supplied to another on the faith of that promise, and of course after it,

(a) 8 B. & C. 728; S. C. 3 Mann. & R. 444. (b) 6 Bing. 506.

shows that criterion to be inadmissible. A distinction was also hinted at, from the circumstance of *Hadley's* debt being due to a third person, and the default therefore incurred towards him, not towards the bail; but here again is the surmise of an intention in the legislature, which none of its language bears out. And, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt or surrendering?

There does not appear any objection to the test laid down in the note to 1 *Wms's. Saunders*, 211 c, and it is decisive in favor of the objection. The original party remained liable, and the defendant incurred no liability, except from his promise.

Rule absolute(a).

(a) See 1 Ry. & Moo. 348

### SANDYS v. HODGSON.

**TROVER** for a dog. Pleas: 1. that the dog was not the property of the plaintiff modo et formâ. 2. Not guilty. 3. That defendant, by leave of the plaintiff, converted and disposed of the dog modo et formâ &c. Replication taking issues on the first and second pleas; new assignment to the third plea of a different conversion. Pleas to the new assignment, 1, not guilty; 2, leave and license.

At the trial before *Coltman J.*, at the Lancashire Summer assizes, 1837, it appeared that at the previous Spring assizes the defendant had brought two actions of trover for the dog in question, one against *Dowbiggin*, the other against the present plaintiff. In both actions the issue was as to the


obtained a verdict. At the trial of these actions the dog was in the possession of *B.* A few days after the trials, *B.* gave the dog in question to *A.* for the purpose of delivering up to the defendant, with 1s. damages. *A.* accordingly gave up the dog, and at the same time *B.'s* attorney gave the defendant notice that the dog belonged to *B.* and demanded possession; the defendant refused: Held, on trover afterwards brought by *B.* for the dog, that *B.* had not estopped himself from recovering by enabling *A.* to give possession of the dog to the defendant.

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The defendant had brought two separate actions of trover for a dog at the same assizes against *A.* and *B.*; in the action against *A.* he recovered a verdict for 50*l.*, to be reduced to 1*s.* by consent, on *A.* giving up the dog; in the action against *B.*, *B.*

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property in the dog. In the first action tried, *Hodgson v. Dowbiggin*, the plaintiff obtained a verdict for 50*l.* damages, subject to be reduced to 1*s.* by consent, on the dog being given up to *Hodgson*. In the second action, *Hodgson v. Sandys*, *Dowbiggin* was called as a witness for the defendant, and proved that the dog had been his, and that he had given it to the defendant *Sandys*; the verdict thereupon passed for the defendant *Sandys*. It also appeared that at the trial of these actions the dog was in the possession of *Sandys*. A few days after the Spring assizes, a Mr. *Poole*, who had been the attorney both of *Sandys* and *Dowbiggin*, in the above actions, accompanied by *Dowbiggin*, called upon *Hodgson*, and *Dowbiggin* thereupon gave up the dog to *Hodgson* with one shilling; *Poole* at the same time gave *Hodgson* a written notice that the dog belonged to *Sandys*, and demanded possession of it, *Hodgson* required time to consider the demand, and on a subsequent demand being made by *Poole*, refused to give up the dog. It also appeared that *Sandys* had ordered the dog to be taken to *Dowbiggin* in order to be given up to the defendant *Hodgson*. On these grounds it was contended for the defendant that *Sandys* had parted with his property in the dog, and that the defendant was entitled to a verdict. Evidence was also tendered to shew that the dog never had been the property of *Dowbiggin*. The verdict passed for the plaintiff, and the learned judge gave leave to move.

*Addison* obtained a rule accordingly to enter a verdict for the defendant, or for a new trial or nonsuit, in the ensuing Michaelmas term, and cited note (6) to 1 *Wms. Saund.* 299, *Oakley v. Davis* (a), and *Bailey v. Culverwell* (b).

*Creswell* and *Alexander* shewed cause on a former day in this term (c). The question is, whether the order by *Sandys* to give up the possession of the dog to *Hodgson* vested the


(a) 16 East, 82.

(b) 8 B. & C. 448; S. C. 2 Mann. & R. 564.

(c) June 6th, before Lord Denman C. J., Littledale, Patteson and Williams, Js.

property in the latter. The judgment obtained by *Hodgson* against *Dowbiggin* was not that *Dowbiggin* should make good title to the dog to *Hodgson*; if it had been so, and *Sandys* had consented to such title being made, it might be contended that *Sandys* had parted with the property. But the terms of the verdict were merely that *Dowbiggin* should deliver up the dog to *Hodgson*. If the dog had been in *Dowbiggin's* possession at the time of trial, his delivering up the possession then could not affect the right of *Sandys*, how then can the consent of *Sandys* to his delivering up possession affect his title? It is clear from the evidence that *Sandys* authorized the possession only to be given up, not the property; if therefore *Dowbiggin* gave up more, he exceeded his authority. If it should be attempted to deny that there was sufficient proof of conversion, *M'Combie v. Davies* (a), shews clearly that any exercise of control over a chattel with a knowledge that it belongs to and is claimed by another is a conversion. In that case it was held, that the accepting an assignment from a party who had no property in the goods, and refusing to deliver them up to the owner on demand is a conversion. The cases cited on moving for the rule do not appear applicable.

*Addison* (with whom was *W. H. Watson*) contra. The verdict ought to be entered for the defendant. By the connivance of *Sandys*, a trick was played upon *Hodgson* in order to defraud him of the benefit of the verdict he had obtained against *Dowbiggin*. Fraud is as much discountenanced in a court of law as in a court of equity. As therefore *Sandys* enabled *Dowbiggin* to deal with the dog in question as his own, and thereby to defeat *Hodgson's* rights, the rule of law is applicable which estops him from subsequently setting up any claim of his own, *Pickard v. Sears* (b), and 3 *Bac. Abr. Fraud* (B). In that work many cases are cited which bear upon the present. Thus, where

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(a) 6 East, 538.

(b) 2 N. & P. 488.

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a mother being absolute owner of a term, allowed her son to declare that the term was to come to him at her death, and witnessed a deed whereby he disposed of the reversion, it was held that she was compellable to make good the settlement (*a*). So if *A.* has a prior incumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own incumbrance, this is a fraud in him, for which his incumbrance shall be postponed, 3 *Bac. Abr.* 774, (7th ed.) If this case had come before the Court of Chancery, equity would have compelled *Sandys* to make title to *Hodgson*, but *ex dolo non oritur actio*, and therefore *Sandys* cannot be permitted to sue in a Court of law. [*Patteson J.* I do not see how *Sandys* could be a party to any fraud, unless he consented to the verdict passing for the plaintiff in *Hodgson v. Dowbiggin*, which is not very likely, as that would be giving a victory over himself.] The fraud of *Sandys* consisted in enabling *Dowbiggin* to defeat *Hodgson* of his claim to 50*l.* by giving an illusory possession of the dog for five minutes.


*Cur. adv. vult.*

Lord DENMAN C. J. on this day delivered the judgment of the Court.—On the trial it was contended, that *Sandys'* conduct precludes him from setting up any claim of property in the dog, as it plainly led *Hodgson* to believe it his, *Hodgson's*, property, and recourse was had to the principle lately expounded in *Pickard v. Sears (b)*, which runs through many cases in equity, and is thus stated by *Sugden* (V. & P. 726.) “If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right.” But I cannot apply that doctrine to the case before us, because I do not perceive how *Sandys* induced *Hodgson* to become the purchaser of the dog, for in the first place he did not become the purchaser, but only established a right of action against *Dowbiggin* as a wrong-doer; and 2dly, *Sandys*

(*a*) *Hunsden v. Cheyney*, 2 Vern. 150

(*b*) 2 N. & P. 488.

cannot be said to have persuaded him that he admitted his title, having himself so lately claimed to hold the dog against him. If indeed it had been proved that *Hodgson* was induced by *Sandys*' conduct to enter into a disadvantageous compromise of the action, there might have been some difference; but we do not know that it was such. *Hodgson* may have entitled himself to recover the dog against *Dowbiggin*, and it would then be just to enter a verdict for what may be the whole amount of the damages laid in the declaration, called penal damages, to compel restitution. But the fact of conversion may have entitled *Hodgson* to no more damages than the 1s. actually paid. And this arrangement between them, as far as appears, was wholly independent of the question of property as between *Sandys* and *Hodgson*. For, though *Sandys* may have claimed through *Dowbiggin*, there is no inconsistency in supposing that *Dowbiggin* was in such a position towards *Hodgson* as to have no defence against him, and yet that *Sandys* was entitled as owner to recover it from *Hodgson*.

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Rule discharged.

COLLINS v. YEWENS.

Wednesday,  
 June 12th.

**HUMFREY** in Easter term last had obtained a rule calling upon the plaintiff to shew cause why the defendant should

1. Where a party is illegally arrested by a sheriff's


officer without a warrant, detainers lying in the sheriff's office have no operation against him, whilst he is in such illegal custody, and therefore he is entitled to his discharge against all detainers, but he is not privileged during such time from arrest on any valid warrant.

2. A sheriff's officer cannot justify an arrest made without a warrant by procuring a warrant previously issued to another sheriff's officer, but not executed, to be delivered to himself with his name inserted after the arrest.

3. A prisoner who has been illegally arrested, is entitled to his discharge out of custody on the detainer of the plaintiff, although there has been no collusion between the party making the arrest and the plaintiff.

4. *Quere*, whether a party may be arrested on a ca. sa., which has been issued more than a year, and on which a previous sheriff has returned "non est inventus," without reviving the judgment by scire facias; *semble*, that, as the 3 & 4 Will. 4, c. 67, s. 2, enacts that the writ shall be returnable upon execution, and does not specify any limit, no scire facias is necessary.

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not be discharged out of custody as to the above action, he having been illegally arrested, and why the plaintiff or the sheriff of Middlesex, or his officer, should not pay the defendant the costs of the arrest, and of the motion.

The affidavit of the defendant, on which this rule was obtained, stated the following facts:—On the 3d April, 1839, the defendant was at Messrs. *Wrights'* banking-house, when *Slowman*, a sheriff's officer, came in and stated that he had a writ of execution against him, and should take him into custody upon a warrant grounded on a writ of *ca. sa.* The defendant demanded to see the warrant, but *Slowman* stated that he had left it at his house in Cursitor-street. The defendant resisted the taking him into custody, upon which *Slowman*, with the assistance of two of his followers, took him forcibly to a lock-up house in Cursitor-street. The defendant again demanded to see the warrant on which he was detained, but *Slowman* refused to produce it. On the following day the defendant instructed his attorney to ascertain what were the grounds of his detention, upon which his attorney produced to him a warrant granted to the sheriff of Middlesex upon a *ca. sa.* issued out of this Court at the suit of the plaintiff, on the 13th June, 1837, a copy of which was annexed, and which warrant had been obtained by *Slowman* after the defendant had been lodged in custody as aforesaid. The defendant was in custody of the Warden of the Fleet, having been removed there by habeas corpus; the defendant stated that at the time of the said arrest of the defendant, *Slowman* had no warrant under the hand and seal of the Sheriff of Middlesex authorizing him to arrest the defendant. Some time after the defendant had been in the custody of *Slowman* in Cursitor-street, *Slowman* discovered that one *Nathan*, another sheriff's officer, held a warrant against the defendant granted by the said sheriff on a *ca. sa.* issued in a cause of *Robinson* and another against the defendant, whereupon *Slowman* prevailed on *Nathan* to deliver such warrant to him, indorsed with the following

words, "not executed by me, *L. J. Nathan*, 3d Apr. 1839," and obtained from the Sheriff of Middlesex the insertion of his own name, and that of his assistant, in such warrant, upon which *Slowman* represented to the sheriff that he had arrested the defendant on such warrant, and upon searching for detainers thereon, the sheriff sent out of his office four several detainers, one of which was to detain the defendant in this cause.


The sheriff's warrant annexed to the writ, and addressed to one *Franks* and *Slowman*, was dated 13th June, 1837, and purported to issue on a ca. sa. at the suit of the plaintiff.

The affidavit of the clerk of the plaintiff's attorney stated, in answer, that judgment was entered up in the present action 25th May, 1837, upon a warrant of attorney dated 17th January, 1837, and on the 25th May, 1837 a writ of ca. sa. was issued against the defendant, addressed to the Sheriff of Middlesex. On the 28th September, 1837, the then Sheriff of Middlesex returned "non est inventus" to the said writ, and on 28th September, 1838, the then Sheriff of Middlesex made a like return. The judgment roll in the action had been carried into the Treasury, with the several returns of the said sheriff returned thereon. It was also sworn that the defendant was not arrested by any collusion with the plaintiff and the Sheriff of Middlesex or *Slowman* his officer.

The under-sheriffs stated in their affidavit that on the 3d April, 1839, they introduced the name of *Slowman* into this warrant given to *Nathan*, as it appeared that the writ had not been executed, which was a practice, as to unexecuted writs, that had existed for many years in the office, and they were not at that time aware that the defendant had been arrested by *Slowman*. They also denied the existence of any collusion between *Slowman* and the sheriff.

*Kelly*, on a former day (a) in this term, shewed cause for

(a) May 25th, before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

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the plaintiff. The question is, whether the plaintiff is to be deprived of the benefit of his writ because the defendant has been illegally arrested. It is conceded that, when the arrest has been made by any collusion with the detaining creditor, the subsequent detention is illegal, *Barratt v. Price* (a). But where there has been no collusion, as in the present case, between the party making the arrest and the detaining creditor, the latter is not to be deprived of the benefit of his execution, however illegal the custody of the defendant may be; *Howson v. Walker* (b). It is also objected that the judgment on which the ca. sa. of the plaintiff issued was more than a year old, and therefore that it ought to have been revived by a scire facias, but the answer is that the judgment roll in this action has been carried into the Treasury with the several returns of the sheriff thereon. It is true that there is no testatum alias ca. sa., but it is not necessary that there should be, as a ca. sa. is in force under the Uniformity of Process Act until it is executed. [*Patteson* J. mentioned two late cases in Chancery, *Ex parte Hawkins* (c), *Ex parte Ross* (c).]

*Kennedy* shewed cause for the sheriff. When it is said that the judgment should have been revived by sci. fa., the distinction is not borne in mind between writs of execution before and since the 3 & 4 Will. 4, c. 67. Before that act writs were returnable at a day certain, now they are returnable immediately upon execution; although, by rule of Court the party can be ruled at any time to return what has been done upon the writ (d). A writ therefore is in force till it is executed. The sheriff ought not to be called upon to pay costs in this case, as, where there is jurisdiction, no action lies against the sheriff who executes the process of the Court, although the proceedings have been erroneous; *The Case of the Marshalsea* (e). Where, indeed,

(a) 9 Bing. 566.

(b) 2 W. Bl. 823.


(c) Not yet reported.

(d) See Reg. Gen. Mich. T. 3 W.

4, s. 13.

(e) 10 Rep. 68 b.

the arrest is altogether illegal and the sheriff is connected with it, he is liable; but in that case his privity must be shewn by producing his warrant to the bailiff, on which the arrest was made, *Drake v. Sikes* (a). Here the arrest was made by *Slowman*, as a mere stranger to the sheriff. *Goodwin v. Lordon* (b) shews that there is no privilege from arrest at the time of a party being discharged out of custody on a charge of felony. In *Robinson v. Yewens* (c), which was a similar application by the defendant to the Court of Exchequer, that Court discharged the rule with costs.

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Sir *F. Pollock* (with whom was *Humfrey*) contra. In 2 Arch. K. B, Practice, 686, (4th edit.), it is stated that, if a writ of execution has been sued out, and regularly filed within the year, another writ of execution may be sued out without a sci. fa., otherwise not. The plaintiff, therefore, is in this dilemma, either the arrest has been made upon this writ, although two sheriffs have indorsed "non est inventus" upon it, or else no writ has been returned and filed within the year, and then a sci. fa. is necessary. [*Littledale J.* In *Scott v. Whalley* (d) where judgment had been entered on a bond to secure an annuity, and a fi. fa. issued for the arrears of half a year, the Court held that a second fi. fa. might be issued for the arrears of the subsequent quarter, without reviving the judgment by sci. fa. In *Taylor v. Gregory* (e) it was held, that to save the statute of limitations it was sufficient if the writ was issued, and the returns made at any time previous to the commencement of the action, but perhaps there may be a difference when a writ has been sued out to save the statute.] The argument on the other side is, that a ca. sa. may be kept for five or fifty years without being executed and still be valid, but that is denied. [*Patteson J.* Formerly all writs were re-

(a) 7 T. R. 113.

(b) 1 A. & E. 378; S. C. 3 N. & M. 879.

(c) Not yet reported. See *Pearson v. Yewens*, 5 Bing. N. C. 489.

(d) 1 H. Bl. 297

(e) 5 B. & Ald. 489.

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turnable on a day certain, but now no limit is fixed for the return of writs of execution; they are made returnable immediately after execution.] As to the denial of collusion the test to be applied is, whether the party has been arrested in such a manner as to induce the Court to leave him to sue out a habeas corpus, or to bring his action; if they would discharge him out of custody in a summary way, the case comes within *Barratt v. Price* (a). In *Spence v. Stuart* (b), where a defendant attending before an arbitrator as a witness was arrested, and the plaintiff in consequence of the arrest lodged a detainer, although the plaintiff denied any collusion with the parties making the arrest, the Court made the rule for discharging the defendant absolute with costs.

*Hoggins* appeared for *Slowman*; and *J. W. Smith*, who appeared for another detaining creditor, cited *Rose v. Tomblinson* (c), *Jacobs v. Jacobs* (d), and *Barclay v. Faber* (e).

*Cur. adv. vult.*

#### RICHARDS v. YEWENS.

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This case, in which a similar rule had been obtained to discharge the defendant out of custody, was ordered to stand over. The facts will appear in the judgment now delivered in this, and the preceding case, by

Lord DENMAN C.J.—This was an application to discharge a defendant out of custody, on the ground that he was detained by the sheriff on a writ of *capias ad satisfaciendum* at the suit of the plaintiff, having been illegally arrested in the first instance by one *Slowman*, who had no warrant; and it does not appear by the affidavits at whose suit *Slowman* professed to arrest him. Also on the ground

(a) 9 Bing. 566.

(b) 3 East, 89.

(c) 3 Dowl. P. C. 55.

(d) 3 Dowl. P. C. 675.

(e) 2 B. & Ald. 743.

but no scire facias had been issued to revive the judgment, which was more than a year old. It is unnecessary to give any opinion as to the second objection, inasmuch as we decide in favour of the defendant on the first. It appeared that *Slowman*, who arrested the defendant, was one of the officers usually employed by the sheriff, but he had no warrant in the particular case. The defendant was taken to the lock-up-house of *Slowman*, and whilst he was there *Slowman* obtained a warrant in this action at the suit of the plaintiff *Collins*, on a writ which was in the office before the arrest, but as the warrant was issued subsequent to the arrest he knew that it could not avail him; therefore he applied to *me Nathan*, a sheriff's officer, who held a warrant against him at the suit of *Robinson and another* (the only warrant which appears to have been issued before the arrest), and persuaded *Nathan* to give him up that warrant. *Nathan* informed it that it had not been executed by him, but *Slowman* procured his name to be inserted, and persuaded the sheriff that defendant had been arrested under that warrant. The general rule of law undoubtedly is, that, as soon as a party is arrested in one action he is considered to be in the custody of the sheriff in all actions in which writs have been issued and delivered to the sheriff; for, as Lord Chief Justice *Tindal* says, in *Barratt v. Price* (a), "it would be only an idle and useless ceremony to arrest the defendant in the first; it would be actum agere." But the Lord Chief Justice goes on to add, that, where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ, he is suffering a false imprisonment, and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff." It is obvious that the same observations will apply where the first arrest is by a mere stranger and wrong-doer, for in such case the writs in the sheriff's office cannot operate. But, if in such case a bailiff having a warrant arrests the defendant, already illegally in

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(a) 9 Bing. 570.

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custody, without collusion with those who so have him in custody, such arrest is legal, inasmuch as the defendant is not by such illegal custody privileged from arrest under legal process; and this is the true ground of decision in *Hovson v. Walker* and *Crowden v. same (a)*; therefore if *Nathan*, who had a warrant at the suit of *Robinson and another*, had arrested defendant without collusion with *Slowman*, while he was in *Slowman's* illegal custody, doubtless the arrest would have been good, and all other writs then in the sheriff's office would have attached upon it. But the case here is widely different; *Slowman* is the officer in both actions; the present plaintiff, *Collins*, can have no rights, except through the agency of *Slowman*, to whom a warrant on his writ was directed after the defendant was arrested. *Slowman* makes no affidavit, we do not know at whose suit he professed to arrest the defendant, whether at the suit of *Collins*, or *Richards and another*, or *Robinson and another*—he mentioned no plaintiff's name to the defendant, so far as the affidavits shew, and if we were to hold this arrest or detainer (for it does not appear which it is) good, we should be authorising any sheriff's officer, without a warrant, to arrest any person against whom he fancied that writs were lodged in the office, and then to cure the illegality of his original arrest by procuring warrants on the writs so lodged—a speculation which cannot be endured. An affidavit is made by the clerk of plaintiff's attorney, denying any collusion with the sheriff or *Slowman*, but this is very vague, and besides the warrant in the action is to *Slowman* himself the wrong-doer.

In the case of *Richards and another v. Yewens*, the warrant was not directed to *Slowman*, but to one *Willis* a sheriff's officer. There is an affidavit by the clerk of plaintiff's attorney denying all collusion, and this case depends on the question, whether under the circumstances the writ which was in the sheriff's office before the illegal arrest operated. We are of opinion that it did not, by reason

(a) 2 W. Bl. 823.

of the defendant not being at any time legally in custody of the sheriff under any legal arrest. Here, as in the former case, if *Willis* had arrested the defendant whilst in such illegal custody he could not have been discharged, but no such arrest was made. We are, therefore, of opinion that the rules must be made absolute for discharging the defendant in both actions.

Rule absolute.

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*W*  
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STEAD v. DAWBER and another (*a*).

*Tuesday,  
May 7th.*

**DECLARATION**, that on the 10th May, 1836, the plaintiff and defendants agreed for the sale by the defendants to the plaintiff of a certain quantity of ground bones, to be delivered on the 20th to the 22nd then instant; payment by acceptance at three months from delivery: that on the 17th May the plaintiff, at the request of the defendants, gave them time for delivery until the 24th May. Averment, that from that time plaintiff had always been willing to accept and pay for the bones by a bill &c.; that defendants had notice, and on the 24th May were requested to deliver. Breach; the non-delivery, whereby the plaintiff had been deprived of great profits, the price of ground bones having greatly risen between the making of the contract and the refusal of the defendants to deliver.

In a written contract within sect. 17 of the Statute of Frauds, to deliver, on a certain day, goods of a fluctuating value, to be paid for by bill at three months from delivery, the time of delivery is of the essence of the contract, and any agreement to substitute another day must be in writing.

Pleas:—1, Non-assumpsit. 2, That the plaintiff did not, at the request of the defendants, extend the time of delivery until the 24th May. 3, That the defendants had no notice of the plaintiff's readiness to accept. 4, That the extension of the time for delivery formed part of a contract between the plaintiff and defendants for the sale of goods, to wit, ground bones, for the price of upwards of 10*l.*; that the plaintiff did not accept any part of the goods and virtually receive the same, nor give any thing in earnest to bind the bargain or in part payment, and that no note or

(*a*) Decided in Easter term last.

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memorandum in writing of the bargain was made and signed by the defendants or either of them, or their agent lawfully authorised.

Replications, taking issue on the first three pleas, and traversing that the extension of time was part of the contract.

The cause was tried before *Alderson B.* at the York spring assizes, 1837, when it appeared, from the bought and sold notes, that about 400 quarters of bones were to have been delivered from the 20th to the 22nd May, to be paid for by the plaintiff's acceptances at three months from the day of delivery; that the 22nd falling on a Sunday, a conversation took place between one of the defendants and the plaintiff's agent, and that upon the suggestion of the same defendant the Monday or Tuesday immediately following were substituted as the days of delivery, and that the time for giving the acceptance was also to be proportionately enlarged. It appeared also that bones were a commodity which fluctuated much in price, and that between the 10th May and the 12th June, which was the end of the bone season, the price rose from 15s. to 24s. a quarter. On the 7th June delivery of the bones was demanded, and refused. It was objected for the defendants that, as the enlargement of the original contract was not in writing, it was void within 29 *Car. 2*, c. 3, s. 17. Verdict for the plaintiff, with leave to move to enter the verdict for the defendants on the first and fourth issues.

*Alexander*, in Easter term, 1837, obtained a rule nisi, on the authority of *Goss v. Lord Nugent (a)*.

*Cresswell* and *Martin* shewed cause (*b*). The consent to receive the bones on one day instead of another formed no essential part of the contract, and need not therefore have been in writing within the statute. For this position *Cuff v. Penn (c)* is a direct authority. The defendant in

(a) 5 B. & Ad. 58; S. C. 2 N. & M. 28.


(b) In H. T. (January 21st) be-

fore Lord Denman C.J., *Littledale, Williams and Coleridge Js.*

(c) 1 Mau. & S. 21.

that case agreed by a written contract to purchase of the plaintiffs a certain quantity of bacon, to be delivered in certain portions at stipulated times, and, after part had been delivered, requested the plaintiffs, as the sale was dull, not to press the delivery of the residue, to which they assented. The defendant was held liable for not accepting within a reasonable time afterwards; and Lord *Ellenborough* C. J. observed, in delivering the judgment of the Court, "Here what has been done is only in performance of the original contract. It is admitted that there was an agreed substitution of other days than those originally specified for its performance: still the contract remains." That case is supported by *Thresh v. Lake* (a), where Lord *Kenyon* C. J. ruled that, "where parties by consent enlarge the time within which an agreement is to be performed, it is a continuance of the same contract; and, on a declaration on the original contract, performance in the enlarged time is good evidence, and will support the declaration." The authority of these cases has not been shaken by *Goss v. Lord Nugent* (b), in which the contract itself was varied by parol, and the plaintiff himself in his declaration relied on the parol stipulation as part of the contract. The present plaintiff relies not on the varied, but on the original contract. How can that be called a part of the contract which is a dispensation of so much of it as relates to the time of delivery? The enlarged time was mere matter of indulgence, founded on no consideration; and performance at that time, if not a literal fulfilment of the contract, would be good by way of accord and satisfaction. The defendant is in this dilemma; if there can be a parol dispensation of part of the contract, the dispensation forms part, and, if there cannot, it forms no part of the contract, and is a mere nullity.

*Alexander and Cowling*, contra. The plaintiff himself has made the variation of the contract material, for he says

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(a) 1 Esp. 53.

(b) 5 B. &amp; Ad. 58; S. C. 2 N. &amp; M. 28.

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that delivery was demanded on the 24th May, and refused; and he makes an averment of his readiness to pay on the 24th. And there can be no doubt that time was of the essence of the contract, for not only do bones alter in weight by time, but they are subject to great fluctuation of price. The time fixed for delivery is always considered in courts of law as of the essence of a contract; *Sugd. V. & P.*(a) and *Rothschild v. Hennings*(b): and so also in equity, where the subject of the contract is exposed to constant fluctuation in value; *Doloret v. Rothschild*(c). [*Littledale J.* Those cases relate to stock, which differs in this respect from other goods.] *Cuff v. Penn*(d) is a case which could not now be maintained, except, perhaps, on the ground that a partial delivery had then taken place under the varied contract, so as to withdraw it from the operation of the statute. In *Cuff v. Penn*(d) and *Warren v. Stagg*(e) the question was treated as one of variance only, and no point was raised on the statute; and the latter case is overruled by *Littler v. Holland*(f). In *Harvey v. Grabham*(g) the plaintiff declared for the price of some straw, and after reciting an agreement that plaintiff should grant and defendant take a lease of lands, the straw upon which was to be valued by persons to be named by the parties, stated that defendant afterwards proposed that *D.* should value, and that the plaintiff assented. There was a plea to this, that the first agreement was in writing, and that the agreement as to *D.* being the valuer was verbal only; and the Court held that the waiver of the mode of valuation originally agreed upon was not binding for want of a written memorandum. In *Stowell v. Robinson*(h) it was held that the day for completing a purchase according to a written contract cannot be waived orally; and in *Greaves v. Ashlin*(i) that if a written contract for the sale of goods is silent as to

(a) 9th ed. 419.

3 T. R. 590.

(b) 9 B. &amp; C. 470; S. C. 4 M. &amp; R. 411.

(f) 3 T. R. 590.

(c) 1 Sim. &amp; St. 590.

(g) 5 A. &amp; E. 61; S. C. 6 N. &amp; M. 754.

(d) 1 Mau. &amp; S. 21.

(h) 3 Bing. N. C. 928.

(e) Cited in *Littler v. Holland*,


(i) 3 Campb. 426.

the time for their delivery, parol evidence cannot be given that it was agreed that they should be taken away immediately. In this case time was obviously material, both for the reasons already assigned, and because the acceptance, to be given, would run from the time of the delivery of the goods. *Meres v. Ansell* (a) and *Elmore v. Kingscote* (b) are also authorities generally for the plaintiff. Some of the cases cited for the plaintiff have related to land under the 4th section of the statute; but the difference in language between that and the 17th section is not material as regards the present question: *Kenworthy v. Schofield* (c). The argument, that because the variation of the contract was oral, it was therefore a nullity, is fallacious. An oral waiver of a contract not under seal is perfectly good at common law; but the statute, by affecting the remedy in such a case, renders the partial waiver in effect a total abandonment of the contract, as the original contract in writing is no longer the true contract, and the varied contract, which is the true contract, is not in writing. Nor can the variation be called a nullity for want of consideration, for the enlarged time for giving the bill was a good consideration for the promise to accept the goods at the enlarged time.

*Cur. adv. vult.*

LORD DENMAN C. J., after stating the pleadings and facts of the case, now delivered the judgment of the Court:—

The principles on which this case must be decided are clear and admitted: the contract is a contract within the Statute of Frauds, and cannot be proved as to any essential parcel of it by merely oral testimony; for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude. Many cases were cited in the argument on both sides; the plaintiff's counsel relying

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(a) 3 Wils. 275.

(c) 2 B. & C. 945; 5 C. 4 D.

(b) 5 B. & C. 583; 5 C. 8 D. & R. 556.

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chiefly on *Cuff v. Penn* (a), the defendant on *Goss v. Lord Nugent* (b), the decision in which it is certainly not easy to reconcile with that in the former case. But it seems to us that we are mainly called on to decide a question of fact, namely, what was the intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects except those of the day of delivery and date of the accepted bill with the old one? Where the variation is so slight as in the present case, and the consequences so serious, the mind comes reluctantly to this conclusion; and this reluctance is increased by considering in how many instances of written contracts, within the Statute of Frauds, slight variations are made at the request of one or other of the parties, without the least idea at the time of defeating the legal remedy or the original contract. But the same principle must be applied to the variation of a day and a week, or a month; and it seems impossible to suppose that when the plaintiff had agreed to substitute the 24th for the 22nd, either party imagined that an action could be brought for a non-delivery on the 22nd, or that a delivery on the 24th would not be a legal performance of the contract existing between them. It was urged by plaintiff's counsel that the defendant's argument reduced him to an inconsistency, that he alleged on the one hand an alteration of the contract by parol, and yet on the other asserted that such alteration by parol could not be made. But this is in truth to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract, not under seal, by parol agreements; and in contemplation of law such a contract so altered subsists between these parties; but the statute intervenes, and in the case of such a contract takes away the remedy by action. It cannot be said that the time of delivery was not originally of the essence of this

(a) 1 Mau. & S. 21. (b) 5 B. & Ad. 58; S. C. 2 N. & M. 28.

contract. The evidence shews that the value of the article was fluctuating, and the time of payment was to be calculated from the time of delivery. Where these circumstances exist, it cannot in strict reasoning be argued, as was said by Lord Ellenborough in the case of *Cuff v. Penn* (a), "that the contract remained, although there was an agreed substitution of other days than those originally specified for its performance." Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days, for the same consideration which existed for the old agreement is imported into the new agreement, which is substituted for it.

Putting therefore that construction on what passed between these parties which best effectuates their intention, and giving also full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and consequently that the verdict on the fourth plea should be entered for the defendants.

Rule absolute to enter verdict for  
defendants on the fourth issue.

(a) 1 Mau. & S. 21.

BASTARD v. SMITH and others.


Monday,  
May 27th.

**ERLE** had obtained a rule to shew cause why the taxation of the plaintiff's costs should not be reviewed. The cause had been tried before *Tindal* C. J., at the Devon summer assizes, 1837, and involved an inquiry into a mining custom alleged to prevail in the county. A witness from the Chapter House, Westminster, attended at the trial for the purpose of producing and proving a great number of office copies of ancient records in Latin and Norman French, as evidence for the plaintiff, and for the purpose of translating the same, and also for the purpose of watching and

Where a witness is called to translate and explain ancient documents, Rule 20, H. T. 4 Will. 4, does not apply, and his expenses are allowed, although notice to admit has not been given.

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explaining, if necessary, the documents and translations of documents offered in evidence for the defendants. The defendants, who were entitled to begin, put in evidence many ancient documents, but it was ultimately deemed unnecessary to produce any evidence on behalf of the plaintiff. The verdict passed for the plaintiff. On the taxation of costs the Master allowed to the plaintiff the costs of the witness's attendance. This was objected to, on the ground that no notice had been given, under rule 20, H. T. 4 *Will.* 4, to admit that the copies with which the witness attended were true copies of the original records, so that the original records might have been inspected by the defendants before trial.

Sir *J. Campbell* A. G. and *M. Smith* now shewed cause. Rule 20, H. T. 4 *Will.* 4, does not apply to this case. By rule 7, H. 2 *Will.* 4, the expense of a witness attending to prove the *handwriting to or execution* of any written instrument, *stated upon the pleadings*, is not to be allowed, unless notice has been given to admit; and the subsequent rule extends the same provision to "any written or printed document," whether stated on the pleadings or not. The object of the rule therefore is merely to dispense with proof of execution, and not with proof of their custody or with their production: and the witness did not attend for the above purposes only, but to give translations and explanations of ancient documents, and to check and explain the evidence adduced for the defendants. A translation is a species of oral evidence, embodying the judgment and skill of the witness, and is totally different, in this respect, from a mere copy of an instrument. In *Rowe v. Brenton* (a), a witness gave in evidence what he considered to be the result of many ancient documents. This was allowed on the ground of convenience, which applies in the present case; and Lord *Tenterden* C. J. there observed, "In evidence of this kind I cannot agree to give the time which is necessary to

(a) 3 Mann. & R. 212.

compare Latin documents. The time of the Court would be occupied many months, if we were to go through them all in the way proposed."

*Erle*, contra. The witness appears to have attended principally for the purpose of advising the plaintiff's counsel as to the accuracy of the testimony given for the defendants. The plaintiff therefore should bear the expenses of the witness, for the judge must be presumed to be able to explain to the jury the meaning of all public instruments. The only remaining task assigned to the witness was, that of proving those instruments in the ordinary manner, which would bring the case within the new rules.

LORD DENMAN C. J.—This case does not seem to me to fall within those rules. I do not know that a translation can be considered as a matter of fact to be proved like any other fact, for the judge at the trial ought, perhaps, of his own knowledge, to direct the jury as to the meaning of instruments. But it is certainly convenient to have a witness to explain ancient documents.

LITTLEDALE, PATTESON and WILLIAMS Js. concurred.

Rule discharged.

### JACKSON v. HILL.

Thursday,  
June 6th.

CASE for an escape. The first count of the declaration stated that the liberty of Pickering Lythe, in the county of York, was an ancient liberty with the return of writs, and that defendant was and is the chief bailiff thereof, and then stated that the plaintiff had recovered judgment in the

1. Where a ca. sa. was sued out against T., and delivered to the sheriff of Y., who thereupon

sent his warrant to the bailiff of a liberty within the county, directed "to the gaoler of the county gaol, the bailiff of the liberty, his deputies, and *Job Doe, my bailiffs*," and issued the terms of an ordinary warrant:—Held, that this was a sheriff's warrant, and not a mandate, although informal in being directed to the bailiff's deputies.

2. To a declaration against the bailiff of a liberty, alleging an arrest under a mandate and an escape, a plea against the further maintenance of the action that after the commencement of the suit the sheriff had returned cepi corpus, pleaded by way of estoppel, was held ill.

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Court of Queen's Bench for 54*l.*, with 44*l.* costs, against one *William Taylor* and *William Taylor* the younger, and thereupon sued out a ca. sa. to the sheriff of Yorkshire against the *Taylors*, indorsed for 98*l.*, whereupon the sheriff afterwards, to wit, on &c., by his mandate then duly made under his hand and seal of office of sheriff, directed to the defendant as chief bailiff of the said liberty of Pickering Lythe for the time being, or his deputy, required the said chief bailiff to take the said *Taylors*, if they should be found in his liberty, and them safely keep, so that the said sheriff might have their bodies &c. at Westminster, immediately after the execution thereof, to satisfy &c., according to the exigency of the said writ, which said mandate afterwards, to wit, on &c., was delivered to the defendant, to be executed in due form of law &c., by virtue of which said writ and the mandate thereon made, the defendant, as chief bailiff of the liberty of Pickering Lythe as aforesaid, afterwards, to wit, on &c., within the said liberty, took and arrested the said *Taylors*, and then, by virtue of the said writ and mandate kept and detained them in his custody, in execution at the suit of the plaintiff, for the cause aforesaid, from thence until the defendant afterwards, to wit, on &c., without the leave &c. of the plaintiff &c., suffered the said *Taylors* to go at large &c., and the said *Taylors* did escape out of the said liberty of Pickering Lythe. The 2d count was the same, but alleged the escape generally out of the custody of the defendant.

Pleas to the first count: 1. that Pickering Lythe is not an ancient liberty; 2. that the sheriff of York did not by his mandate &c. require the said chief bailiff to take the said *Taylors* &c.; the 3d, 4th and 5th pleas traversed other allegations in the count; 6th, that, though true it is that Pickering Lythe is an ancient liberty &c., and that the defendant is the chief bailiff thereof, nevertheless there is not and never has been within the said liberty any gaol for the custody of prisoners arrested within the said liberty, by virtue of any mandate directed to the chief bailiff thereof by

iff of Yorkshire; and the plea then set out a cus-  
the chief bailiff of the liberty to keep all prisoners  
by him within the liberty until he could take them  
astle of York, being the prison of the sheriff of the  
by the nearest and most convenient way, and aver-  
the defendant arrested the *Taylors* within the said  
and did by the nearest and most convenient way  
the said *Taylors* out of the said liberty, in and  
the county of York, for the purpose of delivering  
and did then deliver them to the sheriff of the said  
and, because the said castle of York, being in the  
anty, is surrounded by the county of the city of  
o that without taking and conveying the said pri-  
through the said county of the city of York, the  
nt could not then take and convey the said prisoners  
aid castle of York, he the said defendant did, at the  
e when, in the first count mentioned, take and con-  
said prisoners out of the said liberty through the  
nty of the city of York, by the nearest and most  
ent way in that behalf, &c. The 7th plea was de-  
to; see *post*, 464. 8th plea, that the defendant, as  
f the said liberty, had not the execution and return of  
s to be executed within the limits of the said liberty.  
pleas were pleaded to the second count. Replica-  
the 1st, 2d, 3d, 4th, 5th, 8th, 9th, 10th, 11th, 12th,  
d 16th pleas similiter; to the 6th plea, that there  
ancient gaol within the said liberty for the custody  
ners, which said gaol had become and was dilapi-  
and that the chief bailiff was bound to keep and  
in custody, in some convenient place within his  
all such prisoners so by him arrested as aforesaid,  
ding with a special traverse. Replication to the 14th  
at the defendant did not, after the arrest, so soon as  
ld, by the nearest and most convenient way in that  
take and convey the said *Taylors* to the said castle  
k, in the safe custody of him the defendant, as such  
ailiff as aforesaid. The 15th plea was demurred to;  
it, 465.

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At the trial before *Parke B.*, at the York summer assizes, 1837, it appeared that Pickering Lythe was an ancient liberty with the return of writs within the county of York, and that the defendant, being the chief bailiff of the liberty, had, by his officer *Spenceley*, arrested the *Taylors* by virtue of the instrument hereinafter set out, and conveyed them to York Castle, and there given them into the custody of the sheriff of Yorkshire. The first count of the declaration was framed on the ground that the chief bailiff of a liberty had no right to convey prisoners arrested by him out of his liberty, *Boothman v. The Earl of Surry (a)*; and the second count and the subsequent pleadings were framed to meet the case, that, if the defendant was entitled to convey prisoners so arrested to the gaol of the sheriff of the county, the defendant had not taken them by the nearest and most convenient way. The plaintiff proved that on the 26th April, 1836, he sued out a writ of ca. sa. against the *Taylors*, directed to the sheriff of Yorkshire, and requested him to address the warrant thereon to the chief bailiff of the liberty of Pickering Lythe. The warrant which was issued thereupon was in the following form, and appeared to be an ordinary printed sheriff's warrant, with the words in italics interlined, and the non omittas clause struck out:

"Yorkshire, to wit. *N. E. Y. Esq.*, sheriff of the county aforesaid, to the keeper of the gaol of the said county, *and also to the chief bailiff of the liberty of Pickering Lythe, his deputies, and Job Doe*, my bailiffs, greeting. By virtue of a writ of &c., I command you and every of you, jointly and severally, that you take, or one of you take, *William Taylor* and *William Taylor* the younger, if they shall be found in my bailiwick, and them safely keep, so that I may have their bodies before our sovereign lord the king at Westminster, immediately after the execution hereof, to satisfy *David Jackson*, as well &c., which in the said Court were awarded to the said *David Jackson*, for his damages &c., whereof the said *W. Taylor* and *W. Taylor* the younger is convicted," &c.

This warrant was indorsed to levy 98*l*.

The defendant contended that the whole proceeding was a trick on the part of the plaintiff, in order to bring the

(a) 2 T. R. 5.

endant within *Boothman v. The Earl of Surry* (a), and that the arrest of the *Taylors* had not been made by virtue of the instrument, as a *mandate* to the defendant as chief bailiff, but as a *warrant* to him, constituting him sheriff's officer. The jury, under the direction of the learned judge, found a verdict for the plaintiff on the issues that Pickering was an ancient liberty with return of writs, and for the defendant on the 2d, 3d, 4th, 5th, 10th, 11th, 12th and 13th issues, with liberty to the plaintiff to move to enter a verdict for himself on those issues, with 98*l.* damages. On the 6th and 14th issues, as to the immemorial custom, the jury were discharged by consent.

*Atcherley* Serjt. in the ensuing Michaelmas term, obtained a rule nisi accordingly.

*Dresswell* and *Wightman* now shewed cause. The second, third, fourth and fifth pleas, in effect, deny that the defendant has disobeyed the writ directed to him. That writ orders the sheriff to arrest the *Taylors*, and he has done so. The writ in question is an ordinary sheriff's warrant, with the non omittas clause struck out, and is not, as will be contended, a mandate to a bailiff. It is clear that, if it were a mandate, the bailiff of Pickering Lythe could not arrest or detain persons out of his liberty; but under this writ he might have arrested the *Taylors* in any part of the county. The sheriff may appoint any one he pleases to execute the writ within his bailiwick, and as well the bailiff of a liberty as any one else. A mandate, as appears by the precedent in the King's Office of Bailiff of a Liberty, 76, commands the bailiff to *keep the body* if found within the liberty, not to arrest within the sheriff's bailiwick, as in the present case. It will be said that the sheriff could not appoint any one to enter into a bailiwick, because there is no non omittas clause; but the sheriff may arrest within a liberty if he chooses to undergo the risk, for he is only liable to an action by the lord of the franchise; *Villa de Darby v. Fox-*

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*ley* (a). And it appears by two old cases that the lord of a liberty may waive his franchise, and that the bailiff of a liberty may act as the sheriff's bailiff if he chooses: *Munday v. Frogat* (b), *Anonymous* (c). It would be unreasonable if it were not so, for, as the sheriff may arrest within a liberty, and is liable only to the lord of the franchise, there can be no reason why the lord should not be allowed to waive any injury to himself. Suppose that, after this warrant had issued, some other person within the county had arrested the *Taylors*, and then the sheriff had discharged them, on the ground that he had issued no warrant to arrest them, but only a mandate to the bailiff of Pickering Lythe, he clearly would have been estopped from making such averment, and would have been liable for an escape. Accordingly, when the sheriff in this case was ruled, he returned *cepi corpora* (d). [*Littledale J.* In *Carrett v. Smallpage* (e) the question as to bailiffs of liberties was much considered, but it does not touch the present point.] *Boothman v. The Earl of Surry* (f) is the case on which the present plaintiff has founded his action. It was held there that the bailiff of a liberty who had received a mandate from the sheriff to arrest a party, and who removed the prisoner so arrested out of the liberty to the county gaol, was liable for an escape. But there the defendant received a regular mandate, and he had besides a gaol, in which he might have detained the prisoner, which does not appear to have been the case here. Another point to be relied on in the present case is, that the defendant treated this as a mandate, and applied to the Court for time to make a return to it, and therefore that he is estopped from denying that it is a mandate now (d). But if the defendant is to be bound by such an application, it would have the effect of debarring him from ever relieving himself by application

(a) 1 Rolle, 118.

(b) 3 Keb. 71, 117, 125.

(c) March, 25, pl. 57.

(d) See the facts stated in *Jackson v. Taylor*, 5 Dowl. P. P. 140.

(e) 9 East, 330.

(f) 2 T. R. 5.

the Court; and *Coleridge J.* held (a) that, he was entitled to discharge the rule calling upon him to make a return, though he had made the application for time. [*Patteson J.* My brother *Atcherley* contended that this warrant is an instrument with a double aspect, a mandate in a liberty and a warrant in the county.] That cannot be so; the instrument is one and entire, and is nothing but a sheriff's warrant. [*Patteson J.* It appears by a note to *Ritson*, that the practice in Yorkshire has been, as in the present case, to direct the warrant as well to the bailiff of a liberty as to his own bailiffs, who may take defendant round *extra libertatem*; and he adds that this method is not objectionable. I do not know what authority there is for these notes.] Suppose the bailiff had arrested under this instrument *extra libertatem*, and a party attempting to escape had been killed,—could it be contended that the bailiff would be guilty of murder? If it is to be contended that it is an instrument with a double aspect, it should be shown that it is a mandate to the bailiff as well as a warrant to the sheriff's officers, and that the bailiff had the authority to detain, which a mandate would give. The bailiff of a liberty and a sheriff's bailiff differ in no respect as to their duty, but only as to the locality where that duty is to be executed, and in both cases they derive their authority from the sheriff; but the only difference is that, as a sheriff does not *appoint* the bailiff of a liberty, he is not answerable for his acts; but, if the sheriff constitutes the bailiff of a franchise his own bailiff, he gives him all the powers of an ordinary sheriff's officer. In *Grant v. Bugge* (b) these questions were much considered.

*Atcherley Serjt.*, *Knowles* and *W. H. Watson*, contra. The question is not whether this instrument might not be as good as a sheriff's warrant if addressed to the sheriff's ordinary bailiffs, but whether it is not valid as a mandate when addressed to the bailiff of a liberty. In the earlier

(a) See the facts stated in *Jackson v. Taylor*, 5 Dowl. P. C. 140.

(b) 3 East, 128.

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forms to be found there is but little difference between a warrant and a mandate, except in the direction. *Dalton, (Sheriffs,)* c. 39, p. 181, says as to "warrants to be made to the bailiff of a liberty, they are to be like to those which are made by the sheriff to his other bailiffs;" and according to a number of forms of mandates filed of record in this Court in different cases, this appears to be a regular mandate (a). It is said that a mandate directs the bailiff to keep the body; but none of these forms is so, nor did the mandate in *Boothman v. The Earl of Surry* (b) contain any such direction. [Patteson J. The argument is, that the sheriff has constituted all the parties named in the instrument as "his bailiffs," and therefore that it is an ordinary sheriff's warrant.] It is illegal as a sheriff's warrant, because it is addressed to the chief bailiff or his *deputies*, for an ordinary sheriff's bailiff can have no deputy; and if he calls in any one to aid and assist him, the person so called in has no authority except in his presence. Whereas if it be treated as a mandate, it is regular, for the bailiff of a liberty may have a deputy (c). If the sheriff had intended to appoint a sub-bailiff, he ought to have named him. There are cases where the attorney has added the name of a party as sheriff's bailiff, and it has been held bad; *Burslem v. Fern* (d), *Housin v. Barrow* (e); although in the latter case the sheriff's warrant was addressed to *all* his bailiffs of the county. The proper mode of construing the instrument is to take it *distributive*, as an order to the sheriff's bailiff to arrest in the county at large, to the defendant to arrest in the liberty of Pickering, and to the keeper of York Castle to receive the prisoners; and this is the true rule of construction, as appears by *Blatcher v. Kemp* (f). Besides, although not usual perhaps for a sheriff to designate the bailiff of a

(a) Serjt. *Atcherley* handed up to the Court a collection of mandates which had been copied from instruments in the treasury of this Court.

(b) 2 T. R. 5.

(c) See Cro. Jac. 242.

(d) 2 Wils. 47.

(e) 6 T. R. 122.

(f) 1 H. Bl. 15, n.

liberty as his bailiff, there is no impropriety in it, for he is so in fact, as appears by *Dalton*, (*Sheriffs*) p. 181. [*Patterson* J. That is denied by *Ritson*, p. 16: he says the bailiff is minister to the crown, and has nothing to do with the sheriff(a).] That seems to be an error of *Ritson*. In *Grant v. Bagge* Lord *Ellenborough* said (b), "As far as respects the process of *this* Court, the bailiff of the franchise of Ely is no more than the special bailiff of the sheriff;" and in *Shaw v. Simpson* (c) it was held that he was concluded by the sheriff's return. So in *Skinn.* 414, where there is an elaborate argument by the reporter, though no judgment, it seems clearly proved that a bailiff is servant to the sheriff; and some of the authorities cited in *Newland v. Cliffe* (d) establish the same position. *Munday v. Frogat* (e) does not apply here; for, although the bailiff of a liberty may waive his privilege, the defendant did not do so here. And this affords an answer to all the argument on the other side; because, as the defendant treated this instrument as a mandate, acted upon it, and applied for time to make a return, *Jackson v. Taylor* (f), even although it be in form a sheriff's warrant, the defendant is estopped from denying it to be a mandate; *Platel v. Dowse* (g). In that case an ordinary sheriff's warrant was addressed to "S. and Job Doe, my bailiffs;" S. was deputy bailiff of a liberty, and he acted under the writ; and it was held that he could not afterwards dispute that the instrument did not amount to a mandate. Suppose there had been an escape within the county, and that the sheriff in this case had been sued, he would have absolved himself by alleging the liability of the bailiff. *Hamon v. Lord Jermyn* (h) proves that any general mandate by a sheriff to the bailiff of a liberty to execute a writ is sufficient authority.

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(a) See also 19 Vin. Abr. Return (N), n. from Gilb. Hist. C. P.

(b) 3 East, 140.

(c) 1 Ld. Raym. 184.

(d) 3 B. & Ad. 630.

(e) 3 Keb. 71.

(f) 5 Dowl. P. C. 140.

(g) 4 Bing. N. C. 204.

(h) 1 Ld. Raym. 189.

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At the close of the argument the COURT called upon counsel to argue the demurrer.

The seventh plea was as follows. And for a further plea in this behalf the defendant says that the plaintiff ought not *further* to be admitted or received to plead the declaration by him above pleaded, as to so much thereof wherein the plaintiff in his first count alleges that by virtue of the writ and mandate in the first count mentioned the defendant, as chief bailiff of the said liberty, took and arrested the said *Taylors* by their bodies, &c., and kept and detained them in his custody, in execution at the suit of the plaintiff, because he says that after the commencement of the suit and before the day of pleading this plea, at the return day of the said writ, to wit, on &c. the said sheriff of the county of York duly returned the said writ in the first count mentioned, cepi corpora, as by the record of the said writ and return thereof appears, &c. Verification by the record, and prayer of judgment if the plaintiff ought further to be admitted against the said record to plead the declaration by him above pleaded, as to so much thereof wherein the plaintiff in his first count alleges that by virtue of this writ and mandate the defendant, as chief bailiff of the said liberty, took and arrested the said *Taylors*, and then, by virtue of the said writ and mandate, kept and detained them in his custody in execution at the suit of the plaintiff.

The special demurrer set out for causes of demurrer, that the said plea neither traverses nor denies, nor confesses and avoids, the matter therein pleaded as an estoppel, and cannot be set up as such to the taking and arrest of the said *Taylors* by the defendants, or cause of action in the declaration, and also for that the cause of action being for an escape, the plaintiffs being estopped from alleging that the defendant took and arrested the said *Taylors*, cannot constitute any answer to the action, and also for that the said plea is bad for being an argumentative traverse, and for repugnancy, because, if the defendant was guilty of

in escape (and the plea admits it), he must have taken and arrested the said *Taylors*, and also for that the sheriff's return, admitting it to be conclusive, cannot alter the liabilities of the parties at the commencement of the action; and the plea is bad in this, that it is alleged that the sheriff, at the return day of the said writ, returned, whereas there is no return day contained in the said writ. The special demurrer to the fifteenth plea was similar.

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*W. H. Watson*, in support of the demurrer. This plea is certainly novel. It is neither in confession and avoidance, nor in bar, but is pleaded by way of estoppel. The first count states a writ to the sheriff, a mandate thereupon to the defendant, arrest by him, and an escape. The answer made is, that after the commencement of the action, and at the return of the writ, the sheriff returned cepi corpus: it is therefore pleaded by way of estoppel after the commencement of the action, which is novel. [*Little-dale J.* If it be a good plea before the commencement of the action, I do not see why it may not be a good one after.] The plea is bad altogether. It is true that a sheriff's return is an estoppel in an action, but not where the return comes in incidentally. This is laid down in *Dalton*, (*Sheriffs*), 191, on the authority of a case in the Year Book, 5 *Edw.* 4, 1 (a), where it was held that no averment could be had against a sheriff's return in the same action, but that in another action it might. As in debt against the bailiff of a franchise for an escape, on a return by the sheriff that he had taken the body by a warrant directed to him, on this he may aver that no such warrant was directed to him. If this be good law, it is conclusive of the present case; and that it is so is evident from the principle that an estop-

|                                                                                                                                                                 |                                                                                                                                                                                        |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a) "Nota un ne poet aver direct averment encounter retorne de viscount in mesme le action, mes in auter action poet, come in det vers bayliff de franchise pur | escape dun retorne per le viscount que il ad prise lui per warrant a lui sur ca. sa. poet ore in cest action de det avere que nul tiel warrant suit a lui direct." 5 <i>Edw.</i> 4, 1. |
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pel, to be binding, must be reciprocal. In *Parkes v. Mosse* (a), where the defendant justified the taking in trover as a sheriff's bailiff, under a warrant directed to him, and the sheriff had returned *tardè*, and it was sought to estop the defendant by the sheriff's false return, the Court held that he was not estopped, but was justified by the warrant. It seemed to be conceded by the argument, that, if the defendant had been a bailiff of a franchise, no question at all could have been made. Even as regards the sheriff himself, he is not always estopped by his return, as appears by *Brydges v. Walford* (b), where the sheriff had returned, to a writ of fi. fa. against the goods of one *Collin*, that he had levied, and that the goods remained in his hands for want of buyers, and afterwards, on a *venditioni exponas*, sold part of the goods, and was sued for not having sold the residue or paid the proceeds to the plaintiff, the sheriff was allowed to shew that *Collin* was insolvent at the time of the execution, and that the plaintiff knew it, although it was strongly urged that there was no instance of a sheriff being allowed to controvert his own return. [*Patteson* J. At the time the sheriff made the return there it was apparently true.] In *Gyfford v. Woodgate* (c) it was held that the returns of the sheriff on writs of execution were *prima facie* evidence in an action between other parties; but according to this plea they should be conclusive. A special cause of demurrer is also pointed out, viz. that the sheriff made the return at the return day of the writ, whereas now there is no return-day to a ca. sa., but it must be returned immediately on execution (d).

Wightman, contra. If the sheriff's return is a defence at all, it is properly pleaded as an estoppel: *Com. Dig. Return* (G). In *Harrington v. Taylor* (e) it was conceded as incontrovertible that there could be no averment in pleading against a sheriff's return. If a sheriff returns a rescue

(a) Cro. Eliz. 181.

(b) 6 Mau. & S. 42.

(c) 11 East, 297.

(d) See *Collins v. Yemens*, ante, 439.

(e) 15 East, 378.

er false return, it is conclusive between the parties, the only remedy is by action for the false return in case the falsehood of the return may be shewn. *Person J.* In an indictment for a rescue it is not conclusive, according to Lord *Ellenborough* C. J., in *Gyfford v. Odgate* (a).] Perhaps, if not pleaded, it would be evidence that might be answered. Then is not the answer to the action? The writ was sent from this to be returned immediately on execution. The sheriff directs the defendant to take the bodies, so that he (the sheriff) may have them at Westminster. The defendant rests, and then the declaration avers that the defendant allowed the prisoners to escape out of the liberty, and more the averment is perfectly consistent (as the fact with the defendant's having arrested the prisoners, delivered them over to the sheriff of York. What else can the defendant do? He has fully complied with the duty of the writ. *Boothman v. The Earl of Surry* (b) is admitted to be good law; but *Ashurst* J. remarked it was the first action of the kind, which is an answer to the novelty of the plea. There also the bailiff had a place in which he might detain prisoners. Here the defendant had no place in which, or authority given him, to detain, and, if he had detained the prisoners, he would not have followed the terms of the warrant. It appears by a note in 1 *Salk.* 343, that no one can have a gaol in a liberty without a gaol delivery: in such cases therefore the prisoners must be committed to the county gaol. In *Grant v. The Court* (c) the Court held that they could take no notice of the returns of bailiffs of franchises, as the sheriff was the proper officer of the Court.

H. Watson, in reply. As to the return being an estoppel the passage referred to in *Com. Dig.* Return (G), is only a number of instances where a return is conclusive

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1 East, 299.

(c) 3 East, 128.

1 T. R. 5.

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in the same action, which is fully conceded. But, if no averment could be made against a record in another action, how could case for a false return be maintained? Then, if the return is not an estoppel, it is nothing; for an estoppel must be reciprocal: *Com. Dig. Estoppel (B) (C)*. It is asked what was the duty of the bailiff under this writ? His duty was to arrest the prisoners, and to detain them till they were delivered by habeas corpus to the sheriff of Yorkshire.

LORD DENMAN C. J.—With regard to the seventh plea, which sets up as an estoppel to the action that after the commencement of the suit the sheriff returned “cepi corpora,” and goes on to plead the return by way of estoppel, I think it is quite enough to say that there is no authority to shew that it is a sufficient plea for the defendant. He is the chief bailiff of a liberty, and has nothing to do with the sheriff’s return; and I agree in thinking that such a return is only conclusive in the same action, and that it is unwarranted to hold that its falsehood may not be shewn in any other action.

With regard to the issues, I have no doubt that the instrument in question was sent to the defendant to be executed by him as sheriff’s officer. The only strong argument on the other side is, that it is also directed to the defendant’s “deputies,” and that an ordinary sheriff’s bailiff has no deputy; but I do not think we should expect the utmost precision of language in these instruments; and, if we were to hold that that word made it a mandate, there would be as much difficulty in interpreting the instrument on the other side. I think therefore the having the prisoners at large within the county is not an escape.

LITLEDALE J.—The seventh plea cannot be pleaded as an estoppel, consistently with the declaration. It is neither in confession nor denial. By the late act writs are returnable on execution: as soon, therefore, as the defendant

made the arrest, the execution was complete, and the writ returnable. But the allegation in the declaration is, that after the arrest the defendant let the prisoner go: the answer therefore in the plea, that at the return of the writ the sheriff had returned *cepi corpora*, is quite beside the charge. It is quite consistent with that plea, that after the arrest by the defendant there might have been an escape, and yet that the sheriff afterwards had the bodies, which is well admitted by the plaintiff.

As to the issues in fact, I think that this instrument amounts to a sheriff's warrant; for, though the defendant is described in it as chief bailiff of Pickering Lythe, it is also addressed to another person by a fictitious name, who is called "my bailiff," with directions to take the *Taylors*, so that the sheriff might have their bodies at Westminster. I therefore think the defendant was constituted general bailiff to the sheriff.

PATTESON J.—Judgment on the demurrer must be for the plaintiff. The argument for the defendant is founded on the principle, that, the sheriff being a public officer, his returns operate as an estoppel against all parties. But that turns out not to be so; for, although the Court will so far pay attention to them as on a return of a rescue to grant an attachment in the first instance, yet, on an indictment for the same, it may be shewn that the return was false. Mr. *Wightman*, however, contends that it is conclusive in all instances, except where an action is brought for a false return. But this case falls within the very same exception, because if the action be brought against the bailiff of a franchise, who has arrested within the liberty, (in which suppose there is a gaol,) and allowed an escape out of the liberty,—if then there be an action for an escape, and the answer is the return of the sheriff *cepi corpus et paratum habeo*, which would be a return made according to the answer of the bailiff—if this were allowed to be conclusive, it would enable the defendant, who had arrested, to prevent

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the plaintiff from maintaining any action; and therefore exactly resembles the action for a false return. In addition to this, the case from the Year Book shews that the return is only an estoppel in the very action, and that in any other action it may be traversed.

As to the issues in fact, I have felt a difficulty throughout to say what this instrument really is. Several instances of mandates have been given from documents on the files of this Court: they most of them differ in language from one another; but no one contains the words "my bailiff," like the present instrument, which seems a common sheriff's warrant, filled up with the names of the defendant and his deputies, and then it goes on with directions, as it certainly ought not if a mandate only, to arrest the *Taylors* if found within the sheriff's bailiwick. If therefore the plaintiff has taken upon himself to aver an authority to arrest within a liberty only, an authority to arrest in the bailiwick at large does not meet the case. It is said the warrant must be taken *distributive* to the keeper of the gaol at York to detain, to the defendant to arrest within the liberty, and to *Job Doe* to arrest in the county at large: but it clearly was intended that the parties should arrest any where within the county. Another point was made, that a bailiff of a liberty may waive his franchise if he pleases, which is certainly reasonable doctrine. I admit that there was an informality in addressing this warrant to the defendant's deputies, because a sheriff's warrant should be directed to parties by their names, but it is not such an informality as entirely to change the character of the instrument

WILLIAMS J. concurred.

Rule for entering a verdict for the plaintiff
discharged.

Judgment for the plaintiff on the demurrer
to the seventh and fifteenth pleas.

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The QUEEN v. The Inhabitants of FLADBURY.

an appeal against an order for the removal of *Louisa Thomas Berrington*, the Worcestershire Quarter Sessions confirmed the order, subject to the opinion of this upon the following case. By an order of two justices dated the 10th of August, 1838, *Louisa Berrington* moved from the parish of All Saints in the borough of Asham, in the county of Worcester, to the parish of Fladbury in the same county. The order was made upon examination of *Paul Berrington*, which stated that he was the father of the paupers, and that his legal settlement, which was acquired by renting a tenement for 10*l.* by the parish of Fladbury in the year 1811, was in that

The settlement by such renting was denied in the appellants' grounds of appeal.

It appeared, that in 1811 *Paul Berrington* rented under an agreement, and occupied for a year, a cottage, yard and garden, for which he paid 10*l.*, but included in the rent was a right of ferry over the river Avon, from the bank of the premises in question, to the opposite bank of the river Avon in the parish of Cropthorne. The use of the ferry boat and line was also included. The emoluments of the ferry were derived partly from sums paid in lieu of tolls, and partly in specific tolls, which were paid sometimes on the Fladbury side, sometimes in pursuance of the transit, and sometimes on the Cropthorne side. The cottage, yard and garden were not worth 10*l.* in value alone, and it was contended by the appellants' counsel, that under these circumstances the value of the property could not be called in aid to augment the value

1. On the hearing of an appeal at Sessions, the justices, including the chairman, were equally divided, whereupon the chairman gave his casting vote for the respondents. The appellants having objected to this course on the following day of the Sessions, the question was argued by counsel on both sides, and the justices, not being entirely the same as those who voted on the preceding day, determined to adhere to the previous decision. On a case reserved, Held, that, though the decision of the first day was a nullity, it did not clearly appear that the subsequent deci-

was not on the merits, and therefore the Court refused to quash the order.

The Sessions held, that a cottage and garden for which the pauper paid 10*l.* per annum including a right of ferry, and the use of the ferry-boat and line, conferred a legal settlement by renting a tenement. The cottage and garden alone were not worth 10*l.* in value:—Held, that the right of ferry might be properly included in estimating the value of the cottage—and that, as the Sessions had not found specifically that the rent for the ferry-boat and line would reduce the rent below 10*l.*, the settlement was good.

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of the tenement in Fladbury. The sessions held otherwise. A difference of opinion arising on the bench, as to whether the premises, together with the ferry, were of 10*l.* value by the year, an equal number of magistrates, including the chairman, voted on each side, upon which the chairman, with the assent of all the magistrates except one, gave a casting vote in favour of confirming the order. And it was confirmed accordingly.

The following morning the appellants' counsel discovered how the decision had been given, and protested against its legality. The question was argued by counsel on both sides, and the magistrates then present not being entirely the same as those who had so voted on the previous evening, determined to adhere to the decision of the preceding day.

If the Court shall be of opinion that the decisions of the sessions were correct, then the order to be confirmed, otherwise to be quashed.

Domville now appeared in support of the order of sessions, but the Court called upon

Whitmore contra. No one justice has more power than another, the chairman, therefore, had no casting vote, and as the effect of excluding his casting vote would be to make the numbers on each side equal, the judgment given was a nullity, per Lord *Ellenborough* C.J. in *Rex v. The Justices of Leicestershire* (a). The proper course in such a case is to adjourn the appeal from session to session, till the vote of a majority can be obtained, 2 *Nolan*, 546, or, if the sessions do not adjourn the appeal, this Court will grant a mandamus to enter continuances. No case has arisen in which the question as to the chairman's casting vote has been raised; the point therefore must be decided on principle. [Lord *Denman* C.J. The case states, that the justices on the following morning, on hearing the ques-

(a) 1 *Mau. & S.* 442.

ed, adhered to the decision of the preceding day.]
 not a vote on the merits. [Lord *Denman* C. J.
 s not appear.] It may be fairly inferred from the
 ed that it was not. With regard to the settlement
 e question is, whether a ferry can be considered a
 under the 13 & 14 *Car.* 2, c. 12. A ferry is not
 nt, but a mere franchise, it lies in grant only, not
 . No case can be found in which there has been
 pt to set up a settlement by means of a ferry. In
Whipping Norton (a), and *Rex v. North Duffield* (b),
 ld expressly that tolls must be demised by deed,
 as observed by *Best* C. J. in *Mayor of Stafford*
), tolls lie in grant only. Again, no settlement
 ed, because the use of the boat and rope, which
 nal chattels, was included to make up the value.

ille contrà. The decision of the sessions on the
 lay determined the first point, because it is the
 ve of all Courts to alter their decision during the
 f the session, and what they did on the second day
 d the decision of the first. As to a ferry being a
 , the definition, as given from Blackstone by
) is, that a “tenement signifies any thing that may
 a, provided it be of a permanent nature; whether
 a substantial and sensible or of an unsubstantial
 id”—“and a franchise, an office, a right of com-
 e all of them, legally speaking, tenements.” In
Subwith (c), tolls were expressly ruled to be a tene-
 id that a settlement might be gained by renting
 With regard to personal chattels assisting to form
 e, in *Rex v. Whitechapel* (f), an *unfurnished* room
 for more than 10*l.* a year, *Buller* J. held that the
 ould conclude that the tenement was of that value,
 e value of which the personal chattels were rented,

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ist, 239.

an. & S. 247.

ng. 75.

(d) 2 Nolan, 8.

(e) 1 Mau. & S. 514.

(f) 2 Bott, 100, pl. 146.

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was expressly stated. *Rex v. North Bedburn* (a) is to the same effect. So also a water mill of 10*l.* per annum, *Evelin v. Rentcomb* (b), and a windmill, *Rex v. Butley* (c), have been held to be tenements conferring a settlement, though it is obvious they must have been full of chattels. There is nothing to shew in the present case that, if the personal chattels were excluded, the value would not be 10*l.* a year.

Lord DENMAN C. J.—We must take the facts of this case as we find them set out. It is said that the decision of the justices was not binding, because, as the chairman has no casting vote, the numbers on each side were equal, and therefore the judgment was a nullity. But it appears that on the following morning their decision was affirmed. It is suggested that their judgment then did not pass on the merits, but that is not so clearly stated as to enable us to say the justices have not pronounced their judgment on the whole case. With regard to the settlement we must also look at the facts referred to us. The case states that the cottage, yard and garden were not worth 10*l.* per annum alone; and the question was made, whether the profits of the ferry could be added so as to make up the 10*l.* I think that these profits may as well be added as tolls, or any other incidental value which arises from the occupation of the premises. It is true that the use of the boat and line was also included under the rental, but it is not stated of what value these were, or whether the payment for the use of them would have reduced the rent below 10*l.* The case therefore is brought within the rule laid down by Buller J. in *Rex v. Whitechapel* (d).

PATTESON and WILLIAMS Js. concurred (e).

Order of Sessions confirmed.

(a) Cald. 452.

(b) 2 Salk. 536.

(c) 1 Burr. S. C. 107.

(d) 2 Bott, 100, pl. 146.

(e) *Littledale* J. was sitting at the Central Criminal Court.

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*Saturday,  
June 22nd.*

**THE QUEEN v. The Inhabitants of BLACK CALLERTON.**

ON an appeal against an order for the removal of *Hannah Hope*, widow, and her two children, from the township of Black Callerton, the Durham quarter sessions confirmed the order, subject to the opinion of this Court upon a case, which set out an agreement for service that raised a question as to an exceptive hiring.

*Andrew Hope* served for a year under the agreement in question, and resided during all that time in Black Callerton.

He subsequently married and died, and on the 10th of February, 1838, an order in the usual form was made by the justices for the removal of the pauper and her two children from the township of Quarrington to the township of Black Callerton.

A notice in writing of chargeability, and a copy of the order of removal, were served on the overseers of Black Callerton, and likewise copies of the examinations taken before the removing justices, but the examinations did not contain any statement or proof that the pauper and her children were then chargeable to and had been relieved by the township of Quarrington. The township of Black Callerton appealed against the order, and stated in their notice two grounds of appeal.

I. That *Andrew Hope*, the late husband of the said pauper, never gained a settlement in the appellant township by hiring and service.

II. That it did not appear by the copy sent to them of the examinations, taken at the time of making the order, that the pauper and her children were at the time of making the order chargeable to the township of Quarrington.

At the hearing, after the original examinations and the copies sent to the appellant township had been put in, the second ground of appeal was insisted upon by the counsel for the appellants, as a preliminary objection to the respondents going into evidence in support of the order of removal, but was overruled, and the Court of Quarter Sessions proceeded to hear the respondents' case. The ques-

The copy of examinations on which an order of removal is made, and sent under s. 79 of 4 & 5 Will. 4, c. 76, should state that the pauper is chargeable to the removing parish, and if it omit to do so, the order is bad.

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tions for the opinion of this Court are, whether, as it did not appear by the copies of the examinations taken before the removing magistrates, and sent to the appellant township, that the pauper and her children, at the time of making the order of removal, were chargeable to the respondent township, the respondents could be heard in support of such order of removal; and whether the said *Andrew Hope* gained a settlement in Black Callerton by hiring and service.

Should this Court be of opinion on these questions in the affirmative, the order of removal and the order of sessions to be confirmed, otherwise to be quashed.

*R. Ingham* and *Hedley* now argued in support of the order of sessions. Even admitting that the examinations should contain a statement of the pauper's chargeability, still an omission in the justice to take down such fact ought not to prejudice the removing parish. They perform their duty when they send (as they did here) notice of chargeability under sect. 79 of 4 & 5 *Will.* 4, c. 76, which gives all the information required. A distinction was taken by the Court in *Rex v. Kelvedon* (a), between the examinations which proceed from the justices, and the notices to be delivered by the parishes themselves, and it was held that the same strictness was not required in the former as in the latter. So in *Regina v. Church Knowle* (b), where the examination of the pauper omitted to state the fact of his residence in the appellant parish, Lord *Denman* C.J. admitting it to be a defect, still held that it was such a defect as could not mislead. They also cited *Rex v. Ware and Stanslend-Mount-Fitchet* (c), *Rex v. Wykes* (d), *Rex v. Bissex* (e), and 4 *Burn's Just.* (by *D'Oyly & W.*) 1175.

*Cresswell* (with whom was *Grainger*) contra, was stopped by the Court.

(a) 5 A. & E. 687; S. C. 1 N. & P. 138.


(b) 7 A. & E. 478; S. C. 2 N. & P. 359.

(c) 2 Salk. 488.

(d) 2 Str. 1092.

(e) 1 *Burn's Just.* (by *D'Oyly & W.*) 969.

NMAN C. J.—We think the preliminary objection over. It is much better to adhere to a strict view of the matters. If we were to decide against the fact of setting out the fact of chargeability, there would be cumulative removals.

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N J. (a)—Three things are required by sect. 79, of chargeability; 2nd, a copy of the order of removal; 3rd, a copy of the examination upon which such order is founded. And the ground of the argument is, that a removing parish is bound to send notice of removal, it is unnecessary that the copy of the examination should also state the fact. But the justices have authority to make an order of removal, unless the person is chargeable, the fact therefore should appear in the examination. For, although that term is used in the statute, it does not mean the examination of the pauper, but the evidence on which the order is made.

MR. J. concurred.

### Order of Sessions quashed.

MR. J. was sitting at the Central Criminal Court.



HAIGH and another v. BROOKS.

Thursday,  
 June 6th.

MR. JUSTICE. The declaration stated that heretofore, on the 15th March, 1837, in consideration that the defendant had given up, at defendant's request, a previous guarantee by him to pay plaintiff 10,000*l.* for Messrs. L. The sum was as follows:—"In consideration of your *being in advance* to the sum of 10,000*l.* for the purchase of cotton, I hereby give you my word that that amount in their behalf:"—Held, that it was not clear that this guarantee was valid, so as to be worthless as a pecuniary consideration, for it might be valid as to prospective advances, but that at all events, as the plaintiff had at the defendant's request to part with it, the relinquishment of it was a discharge for the subsequent guarantee.


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plaintiffs, at the request of the defendant, would give up to him a certain guarantee of 10,000*l.*, on behalf of Messrs. *John Lees & Sons*, Manchester, then held by the plaintiffs, he the defendant promised the plaintiffs to see certain bills accepted by the said *John Lees & Sons* paid at maturity, that is to say. (The declaration then set out three bills of exchange, drawn by plaintiffs in December 1836, February 1837, and 1st March, 1837, respectively, and accepted by *Lees & Sons*, to the amount of about 10,000*l.*) Averments of non-payment of the said bills at maturity by the Messrs. *Lees*, and of notice to the defendant of non-payment by him.

Third plea: that said supposed guarantee of 10,000*l.*, in consideration of the giving up whereof the defendant made such supposed promise, and which guarantee was so given up to the said defendant, as therein mentioned, was a special promise to answer the plaintiffs for the debt and default of the said Messrs. *John Lees & Sons*; and that no agreement in respect of the supposed guarantee or special promise, or any memorandum or note thereof, wherein any sufficient consideration for the guarantee or special promise was stated or shewn, was in writing, and signed by the defendant, or by any other person by him thereunto lawfully authorized. And the defendant further saith that the supposed guarantee, in consideration of the giving up whereof the defendant made the said supposed promise, and which was so given up as therein mentioned, was contained in a certain memorandum in writing, signed by the defendant, and which was in the words and figures and to the effect following, that is to say,—“Manchester, 4th February, 1837. Messrs. *Haigh and Franceys*. Gent.—In consideration of your being in advance to Messrs. *John Lees & Sons* in the sum of 10,000*l.*, for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*) on that behalf. *John Brooks*,” and that there was no other agreement or memorandum or note thereof, in respect of or relating to the supposed guarantee

or special promise. Wherefore the defendant says, that the supposed guarantee, in consideration whereof the defendant made the supposed promise, is void and of no effect, and therefore that the supposed promise is void and of no effect. Verification.

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Special demurrer, on the ground that it is admitted by the plea that the memorandum, the giving of which was the consideration of the guarantee in the declaration mentioned, was actually given up to the defendant by the plaintiffs, and the consideration was therefore executed by the plaintiffs; and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned.

Sir *W. W. Follett* (with whom was *Wightman*) in support of the demurrer (a). It is immaterial whether the guarantee given up, which is the consideration alleged for the promise declared upon, was or was not such a guarantee that an action might have been brought on it under 29 *Car. 2*, c. 3, s. 4. There might be many reasons why the defendant should wish to have back the guarantee, however worthless it might be to the plaintiffs. It might have been of the utmost importance to the defendant's credit in the mercantile world, that it should not be known that he had given such a guarantee. An act done by a plaintiff at the request of a defendant must be taken to be a benefit to the latter, and the defendant having requested that the act should be done, cannot say it is of no value. The giving up of a mere letter or piece of paper, at the request of the defendant, would be a sufficient consideration for his promise; and a court of law cannot inquire into the adequacy of the consideration, whether the promise is to pay 6*d.* or 10,000*l.* Suppose the guarantee given up had been a stale guarantee, it would not have been *void* any more than a guarantee which is not expressed conformably to the sta-

(a) Last H. T. (Jan. 18th), before Lord *Denman* C. J., *Littledale, Williams and Coleridge* Js.

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tute of frauds; the only consequence in either case is, that no action could be brought on the instrument. Yet it cannot be doubted that it might well answer the purpose of a merchant to buy off a stale guarantee, in order to avoid the publicity of defending an action upon it. In either case the giving up of a guarantee, on which no action could be maintained, would form a good consideration for the enforcement of a promise in respect of it. The present case must not be confounded with the case of an action on such a guarantee. A mere moral obligation is a good consideration to support an express promise; *Lee v. Mugeridge* (a). But it is not clear that the first guarantee was void. Formerly it would have been considered valid beyond all question; *Boehm v. Campbell* (b). It is not necessary to contend that that case was rightly decided; it is enough that it has been decided, for, if the liability of the defendant on the guarantee was at all doubtful, the surrender of it was an ample consideration for his promise. The release of a doubtful right is a good consideration; *Longridge v. Dorville* (c), and *Stracy v. The Bank of England* (d). The present is a stronger case, for the plaintiffs gave up not a claim which they might or might not have been able to maintain, but a document which was their undoubted property, and the retention of which by them might in itself have been prejudicial to the defendant's character, independently of the doubtful claim arising out of it. If the defendant had accepted bills on an insufficient stamp, and they had been restored to him on his request, that would have been a good consideration. A court of law has nothing to do with the relative value of the consideration and the promise: this subject was much discussed in *Hitchcock v. Coker* (e).

Sir J. Campbell A. G. (with whom was Tomlinson)

(a) 5 Taunt. 36.

(b) 3 B. Moore, 15.

(c) 5 B. & Ald. 117.

(d) 6 Bing. 754.

(e) 1 N. & P. 796.

The first guarantee was worthless, the giving it therefore, could be no consideration for the second. The law as to the sufficiency of a past consideration is to be found in 1 *Wms. Saund.* 264, n. (1). Truly the liability on such a guarantee as the one in question might have been doubtful, but it can no longer be averred so. At the time when *Boehm v. Campbell* (a) was decided, Lord Eldon in *Ex parte Minet* (b) had doubted the authority of *Wain v. Warlters* (c), but the law on this has been completely settled by a series of cases; *Dyer* (d), *Wood v. Benson* (e), *James v. Williams* (f), *James v. Armstrong* (g), and *Raikes v. Todd* (h). If the point, therefore, can ever be settled, it cannot be decided that in giving up the guarantee the plaintiffs gave no doubtful right. Every consideration must be of some value; *Smith v. Smith* (i), *Rann v. Hughes* (k), and 1 *Wms. Saund.* 137 e, n. (b). Can it be said that the giving up of a libellous letter, of no value to the holder, but which if published in a newspaper, be injurious to a debtor's credit, would form a good consideration? In *Judge v. Dorville* (l) and *Stracy v. The Bank of England* (m), the claims abandoned were of doubtful value, and the relinquishment of them was held on that ground to be no consideration. The case put of the giving up of a guarantee is not in point, for the statute of limitations does not *pleaded*, and the defendant may waive that defence, but with respect to invalid guarantees they give no right of action. The giving up bills on a bad stamp would not be a good consideration. The law in *Lee v. Muggeridge* (n), as to moral obligation requiring a good consideration for an express promise, has

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B. Moore, 15.

1 Ves. 189.

East, 10.

C. &amp; J. 461.

C. &amp; J. 94.

B. &amp; Ad. 1109.

Bing. N. C. 761.

(h) Cited from MS.; S. C. 1 Per. &amp; Dav. 138.

(i) 3 Leon. 88.

(k) 7 T. R. 350, n.

(l) 5 B. &amp; Ald. 117.

(m) 6 Bing. 754.

(n) 5 Taunt. 36.

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been shaken by later decisions; *Holliday v. Atkinson*(a) and *Littlefield v. Shee*(b). In all cases of moral obligation, in which the promiser is liable on his express promise, he must have derived some benefit originally, or the promisee have suffered some prejudice. This doctrine is fully borne out by the note to *Wennull v. Adney*(c), and the authorities there cited.

Sir W. W. Follett in reply. To prove the first guarantee bad, cases have been cited to shew that the consideration must be either expressed on the face of the guarantee or necessarily be implied from it. That may now be settled law. But the consideration does appear in this guarantee. And in *Boehm v. Campbell*(d) the guarantee was held good, not because *Wain v. Warlters*(e) was doubted, but because the consideration did appear. In *Raikes v. Todd*(f), it appears that Alderson B., at Nisi Prius, was of opinion that the guarantee "to secure" money which had been advanced implied a promise of forbearance to sue on the part of the plaintiffs, and Patteson J. states that he had difficulty in coming to a conclusion. Here the undertaking is to pay in consideration of the plaintiffs' "being in advance" to the Messrs. Lees. Does the undertaking then necessarily convey the meaning that it was given to secure *past* advances? Yet if "being in advance" means "advancing," which is by no means a forced construction, the guarantee was good. At all events, even after the latest decision in *Raikes v. Todd*(f), it cannot be said that the claim on the guarantee was not doubtful, and if it was doubtful, the abandonment of such claim is an unquestionably good consideration. With respect to moral obligation being a good consideration for an express promise, it has been sought to distinguish promises to pay stale debts and debts contracted

(a) 5 B. & C. 501; S. C. 8 D.  
& R. 163.

(b) 2 B. & Ad. 811.

(c) 3 B. & P. 249.

(d) 3 B. Moore, 15.

(e) 5 East, 10.

(f) Cited from MS.; S. C. 1  
Per. & Dav. 138.

during infancy, on the ground that in those cases the party bound by his promise has received a benefit. But in *Stevens v. Lynch* (a), where the defendant, a surety, knowing that time had been given to his principal, but apprehending that his liability continued, promised to pay the debt, and was held bound by his promise, what benefit was there to the defendant, or what prejudice to the plaintiff, on which to found a consideration? The truth is, that in such cases the promise is to be supported by referring to the original consideration. Suppose defendant had taken away the guarantee from the plaintiffs, would not trover lie? [Coleridge J. In *Scott v. Jones* (b) it is said that trover lies for an unstamped agreement, if it can, upon payment of a penalty and stamp duty, be stamped and rendered available.] It is difficult to say how far the principle contended for on the other side is to be carried. If the second guarantee were given up, it might be said that would not be a good consideration for a promise, inasmuch as the second guarantee was given in consideration of the first, and that the first was of no value. The case put for the plaintiffs, of the giving up of a letter, has been answered by supposing the letter to be libellous, which of course is a different case, as the publication would then of itself be illegal.

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*Cur. adv. vult.*

LORD DENMAN C.J. now delivered the judgment of the Court.—This was a case of assumpsit to see certain acceptances paid, in consideration of plaintiffs' giving up a guarantee of 10,000*l.*, due from the acceptor to plaintiffs. Plea, that the guarantee was for the debt of another, and no writing, wherein the consideration appeared, signed by defendant, and so the giving it up no good consideration for the promise. Demurrer stating for cause that the plea was bad because the consideration was executed, whether the guarantee were binding in law or not. The form of the

(a) 12 East, 38.

(b) 4 Taunt. 865.

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guarantee was set out in the plea—"In consideration of your being in advance to Messrs. Lees in the sum of 10,000*£*. for the purchase of cotton, I hereby give you my guarantee for that amount on their behalf, J. Brooks."

It was argued for defendant that this guarantee is of no force, because the fact of plaintiffs' being already in advance to Lees could form no consideration for defendant's promise to guarantee to plaintiffs the payment of Lees' acceptances. In the first place this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of the giving of the guarantee is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been "in consideration of your becoming in advance," or "on condition of your being in advance," such would have been the clear import. As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at defendant's request.

Here is then sufficient doubt to make it worth defendant's while to possess himself of the guarantee, and if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it. But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so, the promise by which it was obtained from the holder of it must always afford some proof. Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters*(a), the plaintiff was induced by the defendant's promise to part with something which he might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can defendant be justified in breaking this promise by discovering afterwards that the thing, in consideration of which he

(a) 5 East, 10.

gave it, did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives, and of their weight he was the only judge. We therefore think the plea bad, and the demurrer must prevail.

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Judgment for the plaintiffs.

OWSTON v. COATES.

**CRESSWELL**, on the first day of Easter term last, had obtained a rule to shew cause why the defendant should not be at liberty to render himself to the custody of the Marshal of the Marshalsea of the Queen's Bench, under 1 & 2 Vict. c. 110, s. 8 (a).

*Friday,  
 May 24th.*

A trader who has entered into a bond with sureties, under 1 & 2 Vict. c. 110, s. 8, to pay the amount of debt and costs which may be recovered against him, or to render himself, may be rendered by his sureties before judgment.

(a) This section enacts, "that if any single creditor, or any two or more creditors, being partners, whose debts shall amount to 100*l.* or upwards, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such

affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be

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The affidavit of the defendant, in support of the rule, stated the following facts:—The defendant was arrested in July 1838, for 4000/., at the suit of the plaintiff, who sued as trustee for a banking company, to whom he had assigned his debt. The defendant gave bail to the action, and on the 3d December obtained a judge's order under section 7 of the above statute, for entering an exoneretur on the bail-piece, on his entering a common appearance. On the same day an affidavit of the debt was filed in the Court of Bankruptcy under section 8, alleging the defendant to be a trader, and notice was served on him requiring immediate payment; and, payment not having been made, the defendant and two others, as sureties, on the 24th December, executed a bond for 5000/.. The condition of the bond was, that the defendant should pay such sum of money as should be recovered in the action, together with such costs as should be given in the same, or should render himself to the custody of the Marshal of the Marshalsea of the Queen's Bench, according to the practice of the Court, or within such time and in such manner as the Court or any judge thereof should direct, after judgment should have been recovered in the action. The action was tried at the last Yorkshire spring assizes, and a verdict found for the plaintiff for 2500/.. Judgment had not been signed. The present application (an application having previously been made to *Patteson J.* at chambers, and referred to the full Court) was made by the sureties to the bond, with the concurrence of the defendant.

*Addison* shewed cause (a). The 1 & 2 Vict. c. 110, s. 8, provides that, unless the debtor (being a trader) enter

deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the

filing of such affidavit or affidavits, but not otherwise."

(a) In Easter term last (May 8th), before Lord *Denman C.J.*, *Littledale, Patteson and Coleridge Js.*

into a bond to pay the sum recovered by action, "or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment shall have been recovered in such action," he shall be deemed to have committed an act of bankruptcy, &c. It is therefore a preliminary objection to this rule that *judgment* has not yet been recovered against the defendant. But the defendant, even after judgment, cannot be rendered under the statute, "according to the practice of the Court." The only practice known to the Court is, that *bail* may render their principal. If no exoneretur had been entered, and the defendant's bail had remained in force, they might, after judgment, have rendered him. Effect may be given to every word of the above provision by applying it to the case of a trader who has given bail, and such a case may often occur, as arrest on *mesne* process is continued, under certain circumstances, by the 3d section. The words cited, "or within such time and in such manner as the said Court, &c. shall direct," merely refer to the discretion usually exercised by the Courts on special grounds, of enlarging the time for bail to render their principal, as in *Winstanley v. Gaitskell* (a), *Glen-dinning v. Robinson* (b), and *Maude v. Jowett* (c). In 1 *Bac.* Abr. 441, n. (d), (Bail in Civil Causes,) citing 4 *Inst.* 180, and 6 *Mod.* 231, it is stated that the chief difference between bail and mainpernors is, that "a man's mainpernors are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him up on a Sunday, and confine him till the next day, and then render him." When a defendant is rendered by his bail, he is restored to his ancient custody under the writ. The policy of the statute under

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(a) 16 East, 389.

(c) 3 East, 145.

(b) 1 Taunt. 320.

(d) 7th ed.


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consideration does not require power of rendering to be given in any case in which such power did not exist previously. The 8th section makes the refusal to enter into the bond have the same effect as the lying in prison, for the purpose of constituting an act of bankruptcy. The same provision was applied to traders, being members of parliament, by 4 *Geo. 3*, c. 33, s. 1, and 6 *Geo. 4*, c. 16, s. 10. Members of parliament could not be rendered by their bondsmen under those statutes, for there was not in existence any prior custody to which they could be rendered; and for the same reason, an *exoneretur* having been entered on the bail-piece, the defendant cannot be rendered under this statute.

*Cresswell*, contra. The 3d section of this statute, and the distinctions between bail and mainpernors, are immaterial to the present question, which arises on the 8th section, and contains express words, which will be entirely without effect, unless the defendant be allowed to render. The bond given by members of parliament, under 6 *Geo. 4*, c. 16, s. 10, was conditioned absolutely for payment of the debt; but the bond under this statute is either for payment of the debt or for render of the debtor. The argument on the other side is, that the alternative condition of render is to be struck out, and the condition for payment to be made absolute. It may be that the "practice of the Court" as to rendering has never included a case like the present. But wherever a new subject-matter is to be dealt with by the Court, there can be no old practice applying to it. The Court however is enabled by the statute to make a practice, if necessary, to meet the case. Where the legislature directs a thing to be done, the Court will not render the law nugatory, because there is no antecedent practice which is precisely suitable. The Court can make general rules of practice for the carrying out the provisions of the act generally. The words in the 8th section, "after judgment," do not relate to the time of render, but to the act of

bankruptcy after mentioned; if the trader does not pay or give the required bond, and it shall afterwards be *ascertained* by judgment that the sum claimed was really due, he shall be deemed to have committed an act of bankruptcy. At all events the Court can direct now in what way the render shall be made after judgment. [*Littledale J.* We cannot make a conditional direction in case judgment shall be signed.]

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*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—This was a motion by persons who had given bond under the 8th section of 1 & 2 Vic. c. 110, to be allowed to render their principal after verdict against him, and before judgment. The condition of the bond, as required by the act, is to pay the condemnation money or render the defendant, according to the practice of the Court. Now the practice of the Court as to render applies only to cases where a defendant is at large upon bail, and when rendered the defendant is in custody under the writ upon which he was originally taken. In the present case there is no such writ nor any bail, but we think that in order to give effect to the act of parliament, we must construe it to have placed the defendant, who has found sureties by bond under the 8th section, in the same situation as if he had been arrested and given bail, and to have treated the obligors in the bond as bail in the action.

The rule of court for the render, or order of a judge for the same purpose, will then be sufficient authority by virtue of the 8th section of the act for the detention; and the obvious intention of the legislature will be carried into effect. Some doubt existed as to the words “after judgment,” in the 8th section, namely, whether they apply to the whole preceding matter or not, as to which we think that, at all events, they do not apply to a render “according to the practice of the Court,” and as bail would by that practice have been at liberty to render a defendant after

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verdict and before judgment, we think that the obligors in this bond must be at liberty to do the same.

The rule therefore will be made absolute.

Rule absolute.

Friday,  
24th May.

DOE, on the demise of OXENDEN, v. CROPPER.

An arbitrator delivered with his award the following written statement: "If either party should desire to have the grounds upon which I have proceeded in making my award, they are as follows, &c." He then stated his grounds. The award, which was made under an order of nisi prius, directed a verdict for the plaintiff generally in an ejectment brought to recover two distinct closes, and the written statement shewed that he was entitled to one of them only. On application to amend the *postea*, so as to confine it to the close to which the plaintiff was entitled, the Court refused to correct the award by the arbitrator's collateral statement.

BY order of nisi prius this cause, and also an action of trespass by the plaintiff against the defendant, which came on for trial at the Lincoln summer assizes 1837, were referred to an arbitrator, the costs of each cause respectively to abide the event of the award.

In July, 1831, the defendant agreed to let to the plaintiff certain premises at Laceby for three years from the 15th May then last past; and on the 14th May, 1832, agreed to sell the same premises to the plaintiff, the purchase money to be paid in two years from the date of the agreement. The plaintiff failed to complete his purchase by the time stipulated, but remained in possession until February, 1835, when the defendant re-entered.

In May, 1833, the plaintiff became tenant to the defendant of other premises, called Little Becks, and paid half a year's rent from the above date. He continued in possession until March, 1834, when the defendant re-entered. No other circumstance transpired from which the terms of the tenancy could be collected.

The plaintiff brought ejectment to recover both the premises comprised in the contract of purchase and Little Becks. He also brought trespass in respect of the former premises only.

The question to be tried in the ejectment was, whether the plaintiff held the former premises, after the expiration of his tenancy in 1834, as tenant at will, or from year to

. To the action of trespass the defendant had pleaded guilty, and several pleas of soil and freehold. To the other pleas the plaintiff replied a demise from the defendant to him from year to year.

In the ejectment the arbitrator awarded that a verdict should be entered for the plaintiff; in the trespass, that the verdict should be entered for the plaintiff on the issue on notice, but for the defendant on the other issues.

When the agents for the defendant took up the award the arbitrator delivered to them a written statement also, the material parts of which were as follows:—"If either party should desire to have the grounds upon which I have proceeded in making my award, they are as follows." The following was the material part of the statement with respect to the ejectment:—"It was, I think, clear that neither party contemplated a tenancy from year to year from that date, (May, 1834, when the agreement for three years expired,) and that Mr. Oxenden was permitted to continue in possession of the premises mentioned in the declaration in and to pass solely on the footing of the proposed purchase, that he was in the same situation as if he had taken possession under the purchase contract. With respect to the Little Becks, I think there was fully sufficient evidence of a tenancy from year to year, not determined by notice at the time the possession was resumed by the defendant; and consequently the ejectment might be maintained to recover the Little Becks."

*Whitehurst* moved for a rule to shew cause why the Master should not be directed to tax the defendant his costs on all the premises sought to be recovered in the ejectment except the Little Becks, or to disallow the plaintiff his costs except as to that portion of the premises, or why the Master in that cause should not be amended by confining it to the Little Becks. [Lord Denman C. J. We will not give directions in the first instance as to the manner in which the costs are to be taxed. Application can be made to the

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Court for relief, if necessary, after the taxation.] The Court will, at all events, entertain the rule as to the amendment of the *postea* by the award. The Court has power to amend the *postea*, although reference is commonly made to the judge who tried the cause. [Lord *Denman* C. J. We have no doubt on that point.] The Court will exercise that power in the case of a verdict entered under an award. [Lord *Denman* C. J. I think that follows.] The only question, then, is as to the construction of the award. It is apparent from the reasons assigned in writing by the arbitrator that he intended to confine the verdict for the plaintiff in the ejectment to Little Becks only. For the ejectment, in which the award is for the plaintiff, related to the premises contracted to be sold as well as to Little Becks, and the trespass, which related to the premises contracted to be sold only, has been found for the defendant. The paper writing is to be considered as part of the award. That doctrine was established in *Kent v. Elstob* (a), recognized in *Sharman v. Bell* (b), and much extended in *Jones v. Corry* (c), in which case the Court of Common Pleas received evidence of a parol statement by the arbitrator of the reasons for his award, and set the award aside on account of their insufficiency. Before the decision of *Coleridge J.* in *Doe d. Errington v. Errington* (d), it was supposed that, where the lessor of the plaintiff proved title to any part of the premises, he was entitled to a general verdict, and had to take out execution at his peril for such part only as he had proved title to. This notion probably influenced the arbitrator when he directed a verdict for the plaintiff generally, instead of confining it to Little Becks. The case last cited shews that the issue in ejectment is divisible with reference to the several closes claimed, that a verdict may be found of guilty as to one close and not guilty as to another, and that the defendant is entitled to his costs with respect to any close as to which the plaintiff has failed.

(a) 3 East, 18.

(b) 5 Mau. &amp; S. 504.

(c) 5 Bing. N. C. 187.

(d) 4 Dowl. P. C. 602.

*Humfrey* shewed cause (in the first instance). So long since as *Doe d. Bryant v. Wipple (a)*, it was decided that under a demise of the whole, in ejectment an undivided moiety might be recovered. The lessor of the plaintiff recovers his term, but the term of what he is entitled to only. Assuming that the Court may look at what the arbitrator has said dehors the award, it merely comes to this, that the award is repugnant. The award is for the whole, and reasons are given to shew that it should have been for part only.

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 d.
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LORD DENMAN C.J.—After intimating that the course pursued in *Jones v. Corry (b)* might lead to inconvenience, said that the Court could not correct the award in the manner proposed.

LITLEDALE, PATTESON and WILLIAMS Js. concurred.

Rule discharged.

(a) 1 Esp. 360.

(b) 5 Bing. N. C. 187.

YORKE v. CHAPMAN.

Wednesday,
 June 12th.

SIR J. CAMPBELL A. G. in Hilary term last had obtained a rule calling upon the plaintiff to shew cause why all proceedings in this cause should not be stayed.

It appeared by the defendant's affidavit that in April, 1837, the plaintiff was a prisoner in the King's Bench prison, and that a complaint being made to the defendant, as marshal of the prison, of the plaintiff's disorderly conduct, and of his obstructing the officers of the prison in discharge of their duty, the defendant, on hearing the evidence in the presence of the plaintiff, ordered the plaintiff to be confined in the strong room of the prison for one month, under the rule of Court, Easter 6 Geo. 4. An entry of the order of confinement, with the cause thereof,

The statutes 2 Geo. 2, c. 22, & 32 Geo. 2, c. 28, which empower the courts of Westminster Hall to hear and determine in a summary way, and to award reparation, upon the complaint of any prisoner of any abuse committed by the gaoler of the Court &c. in his office, do not take

away the right of action at common law from such prisoner, though *semble* both remedies are not open to the prisoner.

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was duly made in the marshal's book, which was laid before this Court on the first day of the ensuing term. The plaintiff commenced an action for trespass and false imprisonment against the defendant in January, 1838, and in January, 1839, filed his declaration. The affidavit then negatived that any application had ever been made by the plaintiff against the defendant to this Court.

Platt now shewed cause. There is no pretence for this application, and no authority is to be found for it. The marshal of the Queen's Bench prison is not placed by law in a better position than magistrates acting in discharge of their duty. If the defendant has acted justifiably under the 32 *Geo. 2*, c. 28, that will be an answer to the action, if not, the plaintiff is entitled to recover against him in damages. The argument on the other side must be, that, as the defendant acted under the order of the Court, he is entitled to stay the proceedings in the action, whether his conduct has been justifiable or not, but this is a doctrine clearly not sustainable.

Sir *J. Campbell* A. G. contra. The reason why no case is to be found in the books where a similar application to the present has been made, is, that no such action has ever been brought before. The defendant relies upon the 2 *Geo. 2*, c. 22, the 32 *Geo. 2*, c. 28, and the rules of Court made thereupon. By these statutes, the Courts of Westminster Hall are empowered to make rules and orders for the government of their respective gaols, and by rules of this Court of Mich. 3 *Geo. 2*, and Easter, 6 *Geo. 4*, orders for the better government of the Queen's Bench prison have been made. By the latter rule, the marshal is authorized to confine, in the strong room of the prison, any prisoner who shall injure, assault, or abuse any of the officers of the prison, or any other prisoner, for one calendar month for the first offence. Then, by 32 *Geo. 2*, c. 28, s. 11, this Court is authorized to hear and determine in a summary

way the petition of any prisoner, complaining of any abuse whatsoever committed by the gaoler of the prisoner; and by rule of Hil. 59 *Geo.* 3 (*a*), the marshal is bound to present the petition immediately of any prisoner complaining of any grievance within the prison. It is clear, therefore, that a simple statutory remedy is provided for every wrong that may be committed, and it is submitted that it was intended by the legislature to substitute it for the action at common law. Otherwise, the marshal is placed in great difficulty; he has to maintain order amongst a large body of persons, all of whom are insolvent, and yet on attempting to enforce any one of the rules, he exposes himself to an action, in which at all events he will have to defray his own costs. If it had been suggested that the defendant had exceeded the authority given him by this Court, the question might have been different, but no complaint has been made of excess, and the defendant has been clearly acting within his duty.

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Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This was a motion to stay proceedings in an action of trespass brought against the marshal of the Queen's Bench prison, for confining the plaintiff in the strong room. By statutes 2 *Geo.* 2, c. 22, and 32 *Geo.* 2, c. 28, and by rules of Court founded on those statutes in M. T. 3 *Geo.* 2; H. T. 59 *Geo.* 3, and E. T. 6 *Geo.* 4 (*a*), power is given to the marshal to imprison in the strong room any of the debtors in his custody, who are proved to have been guilty of certain offences. And by the same statutes and rules, for the more speedy correction of abuses, the Courts and judges are empowered and required to hear complaints against the keepers of prisons in a summary manner, and award the party complaining, if injured, recompence and costs. But the statutes contain no restrictive words forbidding any

(*a*) "Rules of the Court of King's Bench." Butterworth, 1822.

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action at law in such cases, or enabling the Courts to stay
any actions.

The provision for recompence by summary complaint
appears plainly to be cumulative, and not to take away the
right of any party, who may conceive himself aggrieved, to
bring an action for redress. If, indeed, he has recourse to
the summary remedy, and obtains a recompence, and after-
wards brings an action, the Court would interfere, as is
suggested by Lord *Mansfield* in *Cameron v. Reynolds* (a),
and probably a decision against him on a summary appli-
cation might have the same effect. But we think that he is
not compellable to resort to such remedy, and in the absence
of an authority for such an interference, we think that the
Court has no power to stay the present proceedings. The
rule must therefore be discharged.

Rule discharged.

(a) Cowp. 403.

Monday,
May 27th.

The defend-
ant, who was
libelled in the
Spiritual
Court for non-
payment of
tithes by an
impropriator,
in his personal
answer, set up
a claim in a
third person
as lessee of
the tithes,
but made
no men-
tion of this
claim in his
responsive allegation.

The Earl of BEAUCHAMP v. TURNER.

THE plaintiff, as impropriator of tithes in the parish of
Duffield, in the county of Derby, libelled the defendant, in
the Consistory Court of the Bishop of Litchfield, for sub-
traction of tithes. The defendant put in his personal an-
swers on oath to the articles of the libel, and thereby
swered (among other things) that *Robert Frost* and *William*
Slater claimed to be entitled to the said tithes, as lessee
the Earl of *Beauchamp* of all the tithes in the said pa-
and had demanded the same from the respondent.
defendant put in his responsive allegations or plea, in
he omitted all mention of any lease of the said tithes
the personal answer only, which was no part of the proceedings to issue,
would not grant prohibition to the Court below, on the ground that it was pro-

—Held: that as the lease had not been pleaded, but was
no part of the proceedings to issue,
on the ground that it was pro-

these responsive allegations the plaintiff put in his personal answer.

Denman, in Trinity term, 1838, had obtained a rule to shew cause why a writ should not issue to prohibit any further proceeding in the said suit, on the ground that the Consistory Court was proceeding to try a lease, a matter triable only at common law.

Kelly and *Whitehurst* shewed cause. The defendant does not set up the lease in his plea or responsive allegation on which issue may be taken, but merely in his personal answer, which is not any part of the pleadings. It does not appear, therefore, that the Ecclesiastical Court is about to try any matter out of its jurisdiction. The distinction between personal answers and responsive allegations is adverted to in *Burnell v. Jenkins* (a) and *Morgan v. Hopkins* (b). *French v. Trask* (c) will be relied upon in support of the rule. In that case prohibition was certainly granted, on the personal answer of the defendant that a modus came in question, although it was not regularly pleaded, and the distinction now taken was pointed out to the Court. But that decision cannot be supported. In *Byerly v. Windus* (d), where that case was recognised and a prohibition granted, *Bayley J.* observes in his judgment, "It appears sufficiently upon the pleadings in this cause that the suit below is in progress towards the trial of the prescription;" and he refers to *French v. Trask* (c), as a case in which the modus had been pleaded. In many cases, where leases and other matters, triable only at common law, are involved only incidentally, the Spiritual Court has jurisdiction: *Com. Dig. Prohibition* (G 5 & 6), *Cheeseman v. Hoby* (e), *Wortes v. Clifton* (f), and *Vin. Abr. Prohibition* (U), pl. 23.

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(a) 2 Phill. 391.

(b) Ibid. 582.

(c) 10 East, 348.

(d) 5 B. & C. 1; S. C. 7 D. & R. 564.

(e) Willes, 680.

(f) 1 Rolle, 61.

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CASES IN THE QUEEN'S BENCH,
Denman, contra, relied on *French v. Trask* (a) as a direct
authority, and cited *Com. Dig. Prohibition* (F 14), and
Darby v. Cosens (b).

Lord DENMAN C. J.—*French v. Trask* (a) is certainly
very like the present case, and Mr. *Barrow* appears there to
have taken the same distinction which is relied upon now as
an answer to this rule. But the authorities shew the view
there taken is erroneous. The personal answer of the de-
fendant is no part of the regular proceedings to issue.
There is no ground at present to authorize us to interfere.

LITLEDALE, PATTESON and WILLIAMS Js. concurred.

Rule discharged.

(b) 1 T. R. 552.

(a) 10 East, 348.

THE QUEEN v. THE LORDS COMMISSIONERS OF THE
TREASURY, In re TIBBITS, Town Clerk of Warwick.
CRESSWELL, in Michaelmas term, 1897, had obtained
a rule calling upon the defendants to shew cause why a writ

1. The town clerk of a borough, who had been re-appointed under the provisions of the 5 & 6 Will. 4, c. 76, and was afterwards removed from his office for alleged misconduct, on refusal by the town council to grant him compensation, appealed to the Lords of the Treasury: their lordships decided that, as the re-appointment of the town clerk had been made *bona fide*, and not with the intention of removing him on the first opportunity, and as the cause for dismissal appeared to them justifiable, the town clerk was not entitled to compensation. A mandamus to the Lords of the Treasury, to hear and determine the merits of the appeal, was refused on the ground that, if their lordships had jurisdiction in the matter, they had already exercised it, and, if they had not jurisdiction, that a mandamus would not lie.

Semble, the Lords of the Treasury had jurisdiction to decide whether a clerk has or has not been properly removed from his office.

2. A refusal by the town clerk to deliver up to the town council certain corporate documents and the corporation seal, and an opposition by him to a petition of the council to obtain the appointment of charity trustees, do not constitute sufficient ground to warrant his removal from an office held during good behaviour. Nor is such removal furnished by his acting in concert with another person, who addressed abusive language to the burgess and magistrate of the borough, in a public part of the borough.

of mandamus should not issue, directed to them, commanding them to hear and determine the merits of the appeal of *James Tibbits*, on his claim to compensation for the loss of his office of town clerk of the borough of Warwick.

It appeared by the affidavits, on which the rule was obtained, that Mr. *Tibbits*, previously to the Municipal Corporation Act, had been the common clerk of Warwick, having been appointed to that office on the 7th May, 1827, and that as incident thereto he also exercised the offices of clerk of the peace and clerk to the justices. Under the provisions of 5 & 6 Will. 4, c. 76, he was re-appointed to his office of town clerk on 1st January, 1836. He ceased to act as clerk of the peace on the 1st May, and as clerk of the justices on the 10th August, 1836, in conformity with the provisions of the Municipal Corporation Act; and on the 6th October following, in consequence of some disputes with the town council, he was dismissed from his office of town clerk.

On the 10th September, 1836, *Tibbits* applied to the town council for compensation for the loss of his offices as clerk of the peace and clerk to the justices, and on the 21st January, 1837, he also claimed compensation for the loss of his office of town clerk.

The town council refused any compensation whatever on the grounds that the office of town-clerk was only held during the pleasure of the recorder, that he had received no appointment to the offices of clerk of the peace and clerk to the justices, and that the usage was not such as to raise a just expectation that Mr. *Tibbits* should hold any of the above offices during life.

Mr. *Tibbits* thereupon memorialised the Lords of the Treasury, and set out the following clause in the governing charter of the borough, under which he had been originally appointed common clerk.—The corporation are required to appoint a recorder of the borough, who shall continue in office, and “one man who should be learned in the laws of

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England, who should be and be called common clerk of the borough, to be constituted and named by the recorder for the time being, and who should exercise his office by himself or his sufficient deputy, and should continue in his office so long as it should please the recorder."

Mr. *Tibbits* then set out facts to shew that the office of town clerk was a life office, and that no instance had been known of any party having been appointed to any of the offices for a limited period; and he claimed the sum of 3000*l*. He lastly prayed to be heard before their lordships by himself, his counsel and witnesses.

The town council presented a counter-memorial, setting out the grounds of the amotion of Mr. *Tibbits*, from which it appeared that the town council had resolved to employ Mr. *Parkes*, a London solicitor, to take proceedings relative to the charity estates of the corporation: Mr. *Tibbits* claimed the conduct of the business as town clerk, and refused to give up the documents relating to the estates or the seal of the corporation, and he insisted on keeping the key of the chest in which they were kept. The town council afterwards resolved to petition the Lord Chancellor to appoint a certain number of gentlemen as trustees to the charity estates: Mr. *Tibbits* opposed this petition, and attended at the master's office with affidavits to oppose the trustees nominated by the town council, who thereupon passed a resolution to dismiss him from his office of town clerk.

On the 15th September, 1837, the Lords of the Treasury issued a minute in substance as follows:—

"It appears to my lords that the claim of Mr. *Tibbits* for the loss of his emoluments as clerk of the peace and clerk to the justices is not affected by any allegation of misconduct which took place subsequent to his being deprived of those emoluments. My lords therefore must consider his claim for compensation under those heads separate from the question of his alleged misconduct. As, however, Mr.

Tibbits claims the compensation for these emoluments on the ground of their being attached to the office of common clerk, and as it appears to my lords, from a consideration of the different statements, that such an allegation is correct, it becomes necessary to consider the tenure by which such office was held.

“ The legal tenure of the office was during the pleasure of the recorder, who held his office for life. Mr. *Tibbits* contends that, though the tenure was nominally during the pleasure of the recorder, the usage was such as to raise a just expectation that he should hold the office for life. My lords refer to Mr. *Tibbits*’ own statement, in which they observe that it is admitted by him that in 1798 Mr. *Thomas Greenway*, the common clerk, was, in consequence of a dispute with the late Earl of *Warwick*, dismissed from his office.

“ My lords cannot admit that, with the recent instance before them, they should be justified in declaring that the immemorial usage had been such as to raise a just expectation that the office should continue for life or during good behaviour. They do not therefore judge Mr. *Tibbits* entitled to the benefit of their minute of 1835, but are of opinion that he should be dealt with in the same manner as if he held an office during pleasure in the public service, and retired upon abolition or reduction of office, which course my lordships have pursued in similar cases.”

Their lordships thereupon awarded Mr. *Tibbits* a gratuity of 100*l.* as a compensation for his offices as clerk of the peace and clerk to the justices.

“ It remains for my lords to decide upon the claim for the loss of the office of town clerk, to which Mr. *Tibbits* was elected by the town council, from which he was removed on the allegation of misconduct. The object of the act in giving the privilege of granting compensation in such cases was clearly to prevent the claims for compensation being defeated under color of a re-election and subsequent removal; but it was never the intention of the legislature to

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interfere with the just authority of the town council over their town clerk, or to deprive them of the fair claims which they possess to the zealous and faithful services of their legal adviser and agent. Had my lords any reason to suppose from the papers laid before them that Mr. *Tibbits* was re-elected for the object of defeating his claim for compensation, and of removing him upon any pretext or excuse which might subsequently appear, and not with the bonâ fide intent of continuing him in office so long as he should conduct himself to the satisfaction of the town council, my lords would have felt themselves bound to have awarded him the same compensation as if he had been originally removed from his office. Upon an attentive consideration of the papers, my lords can find no ground to impute such a course to the town council, or to judge that the removal of Mr. *Tibbits* was not made in the bonâ fide and justifiable exercise of the discretion vested in them. In this view of the case my lords are decidedly of opinion that Mr. *Tibbits* is not entitled to compensation for his office, from the removal from the office of town clerk."

Sir *J. Campbell* A. G. and Sir *F. Pollock* for the defendants, and Sir *W. W. Follett* and *Waddington* for the town council (*a*), shewed cause in Hilary term last (*b*). The Lords of the Treasury have heard and determined the appeal of Mr. *Tibbits*, and that is a sufficient answer to this rule. Whether they have decided rightly or wrongly is immaterial, for, as they had jurisdiction, their decision is final; *Rex v. Bridgewater* (*c*). If the lords had refused to hear the appeal this Court might have issued a mandamus, but if they do decide upon it, even though they set out wrong reasons for their judgment, this Court cannot review it.

(*a*) *Cresswell* objected to counsel being heard for the town council, but as the rule had been served upon the town council, the Court decided to hear them.

(*b*) Jan. 12th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(*c*) 1 N. & P. 466.

It is admitted that, if the Treasury had no jurisdiction, as in *Rex v. The Mayor of Poole* (a), this Court might review their decision, but a mistake in point of law, where the Court below has jurisdiction, is not sufficient ground to issue a mandamus; *Ex parte Pratt* (b). It is submitted, however, that the conduct of *Tibbits* was quite sufficient cause for dismissal.

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Cresswell and *Hayes*, contra. It is true that where the Lords of the Treasury have jurisdiction, this Court cannot interfere with them, but it is also true that, if the lords do not exercise that jurisdiction, this Court will compel them so to do. It cannot be said that Mr. *Tibbits*' appeal has been heard and determined. He claimed to be heard by himself and counsel: if his claim had been allowed, the lords probably would not have fallen into the mistake they have made. For it appears by *Ex parte Lee* (c) that their lordships were not aware that an appointment to a corporation office during good behaviour was an appointment for life. Section 66. (5 & 6 Will. 4, c. 76,) provides for compensation to all corporation officers removed under the provisions of the act, and enacts that, if they shall be re-appointed and subsequently removed, they shall still be entitled to compensation, unless removed for misconduct that would warrant removal from an office held for good behaviour. The Treasury seem to have thought, because the re-appointment was not collusive, and that the corporation had good grounds for dismissing Mr. *Tibbits*, that therefore he was not entitled to compensation. But it is obvious a hundred bona fide causes for dismissal might occur, none of which would justify a removal from an office for life. The *bona fides* therefore of the dismissal has nothing to do with the case, but this erroneous view has fettered their lordships in their jurisdiction. It is the common case, therefore, of a Court of Sessions excluding themselves from

(a) 3 N. & P. 119.

(b) 2 N. & P. 102.

(c) 7 A. & E. 139; S. C. 2 N. & P. 63.

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jurisdiction when they possess it, upon which this Court always grants a mandamus. Thus in *Rex v. The Justices of Kent* (a), where the sessions decided not to rate the wages of millers, on the ground that the statutes only authorised them to rate the wages of husbandmen, the Court granted a mandamus; so also in *Rex v. The Justices of the City of York* (b), where the justices misread a compensation clause in a local act, as to the extent of costs to be allowed. It is no answer therefore to say that the Lords of the Treasury have heard and determined this appeal.

Cur. adv. vult.

THE QUEEN v. THE LORDS COMMISSIONERS OF THE TREASURY, In re JOHN TREVOR, Town Clerk of Bridgewater.

IN this case it appeared from the affidavit of *W. J. Trevor*, the father of the said *J. Trevor*, that he, (the father,) for seven or eight years before the 1st of August, 1833, held the office of town-clerk of the borough of Bridgewater during good behaviour, having been appointed to the office by virtue of the charters of the borough. On the 1st of August, 1833, he resigned, when his son, the said *J. Trevor*, was appointed to the same office, and held the same, at the time of the passing of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), during good behaviour, by virtue of the said charters. On the 1st of January, 1836, *J. Trevor* was re-appointed town-clerk under the act. He was removed on the July following, and the town council having refused him compensation, he appealed to the Lords of the Treasury, who decided against his claim, on the ground that he was properly removed for misconduct. The alleged misconduct was, that when a magistrate and alderman of the borough had been abused in violent terms by *J. Trevor*, the father, who was also the partner of *J. W. Trevor* the town clerk, in the most public part of the borough, *J. W.*

(a) 14 East, 395.

(b) 1 A. & E. 828; S. C. 3 N. & M. 685.

Trevor was present, and acted in concert with his father. The applicant had required the defendants to re-hear his appeal, which had been refused.

A rule having been obtained in Michaelmas term, 1837, for a mandamus commanding the Lords of the Treasury to hear and determine the applicant's appeal,

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Sir *J. Campbell* A. G., Sir *F. Pollock*, and *Wightman* shewed cause (a). The determination of the Lords of the Treasury is final. [*Coleridge* J. When a party has been re-appointed after the passing of 5 & 6 Will. 4, c. 76, and has been subsequently removed for misconduct, under the proviso at the end of sect. 66, have the Lords of the Treasury any jurisdiction except as to amount?] The case seems to be put on the same footing as a removal under the act in the first instance.

Jervis and *Jardine*, contra. The Lords of the Treasury need not have given reasons for their judgment, *Rex v. Mayor of London* (b), but, as they choose to give reasons which are insufficient, their judgment may be reviewed. In *Ex parte Smyth* (c) this Court refused a mandamus to the Privy Council to receive a petition for a rehearing of an appeal. But then the appeal had been decided by a court. The Lords of the Treasury are merely public officers appointed to arbitrate; and in the case of an award, if the reasons assigned for it are bad, it may be set aside. *Kent v. Elatob* (d). There is strong ground for interference by mandamus in a case like the present, for the judgment cannot be set aside like an award, nor is there any remedy analogous to an action for a false return. The *quantum* only of compensation was referred to the defendants, and they have not determined that. As to the tenure of the applicant's

(a) In Easter term (April 16), before Lord *Denman* C.J., *Littledale*, *Patteson*, and *Coleridge* Js.

(b) 3 B. & Ad. 255.

(c) 3 A. & E. 719.

(d) 3 East, 18.

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office they cited *Harcourt v. Fox* (a), *Rex v. Owen* (b), and *Baggs's case* (c).

Cur. adv. vult.

LORD DENMAN C. J. on this day delivered the judgment of the Court in both cases. After stating sect. 66 of 5 & 6 Will. 4, c. 76, on which the application was made, and the facts of the *Warwick case*, his lordship continued as follows:—

In the Treasury minute issued on the present occasion, their lordships very candidly disclose the reasons for their decision, observing that the proviso was meant to protect officers from fraudulent motion, but that the town council of Warwick could not be charged with any improper motive, as the dissatisfaction appears to their lordships to be genuine and well founded. But in answer to this it must be said that the protection against fraudulent motion is specific, and is referred to a precise test:—whether the motion would have been warranted by the officer's misconduct.

The town clerk urges that he has been guilty of no such misconduct. We think him in this clearly right, and the contrary proposition was not contended for at the bar. But the cause shewn against the rule was, that the proceeding asked for was already complete, as the Lords of the Treasury had heard and decided the complaint; which is certainly true, so that if they have jurisdiction over the subject-matter, as the application for the rule supposes, they have actually pronounced a judgment which cannot be questioned. The Court however conceived a strong doubt whether this jurisdiction is entrusted by the act to the Lords of the Treasury. An appeal to them is indeed given from the decision of the town council; but the proviso comes after, giving full compensation to such as may be removed without such misconduct as would warrant dis-

(a) 4 Mod. 167.

(c) 11 Rep. 93 b.

(b) 4 Mod. 293.

missal, not such as their lordships may think would have warranted dismissal.

No power is conferred by this act on the Lords of the Treasury for ascertaining the facts which may be thought to prove such misconduct, nor is there any disrespect to their lordships in supposing that they may not be cognizant of the law (often difficult of application) on which the question might turn.

These considerations appear to prove that the Lords of the Treasury have no power to decide the question, whether the town clerk has or has not been properly removed from his office. If they have it not, the mandamus prayed for cannot issue for that reason. If they possess the jurisdiction, the answer, that they have already exercised it, is equally conclusive against making the rule absolute. Whether there may be another remedy it is no part of our duty to decide at present.

Rule discharged.

In another case, moved on the part of the town clerk of Bridgewater, the same judgment must be given, the only difference in the two cases lying in the particulars of conduct, which have been thought to justify his dismissal, but in our opinion certainly do not, within the terms and meaning of the proviso.

Rule discharged.

WAIN *v.* BAILEY (*a*).

Tuesday,
June 18th.

THE declaration stated that the defendant heretofore, to wit, on the 10th October, 1836, made his promissory note in writing, and then delivered the same to the plaintiff, and thereby then promised the plaintiff to pay to the plaintiff the sum of 15*l.* on the 25th March then next, for value

(*a*) Decided during the sittings in banc after this term.

was ready to pay on the note being produced and delivered up to him, and always had been and still was ready to pay on the production of the note.

It is no answer to an action on a promissory note, not made payable to bearer or order, that when the note became due the defendant

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received, which period had elapsed before and at the time of the commencement of this suit.

Plea; that when the said note became due and payable according to the tenor and effect thereof, to wit, on the 28th March, 1837, the defendant was ready and willing to have paid to the plaintiff the amount of the said note, whereof the plaintiff then had notice, and the defendant then requested the plaintiff to produce the said note for the purpose of the same being delivered up to him, the defendant, on payment by him of the amount thereof, but he further says, that at the time the said note so became due and payable, and when he the defendant was so ready and willing to pay the same as aforesaid, and requested the plaintiff to produce the same for the purpose aforesaid, the plaintiff had not the said note in his power, custody or possession, nor could he then deliver or have delivered up the same to the defendant, and confessed and admitted that he had not then the same in his power, custody or possession, and that he could not then deliver up the same to the defendant aforesaid, or even though the defendant should then pay him the amount thereof; whereupon he the defendant did then refuse to the plaintiff the amount of the said note, as he lawfully might, for the cause aforesaid, and which refusal is the alleged breach of promise in the declaration mentioned. Averment, that the defendant had always since the note became due and payable, according to the tenor and effect thereof, and since the said admission and confession of the plaintiff, hitherto been and still is ready and willing to pay to the plaintiff the amount of the said note, on the same being produced to him and delivered up to him on payment of the amount thereof, but that the plaintiff had never since hitherto produced the said note or offered to deliver up the same to the defendant on payment thereof, which the defendant so was and still is ready to make as aforesaid, whereof the plaintiff had notice. Verification.

Replicaton de injuriâ.

At the trial at the Derbyshire spring assizes, 1838, before Park J., the verdict passed for the defendant, and in the ensuing Easter term *N. R. Clarke* obtained a rule nisi to enter a verdict for the plaintiff *non obstante veredicto*; against which

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Whitehurst now shewed cause. It is quite clear law that a party who is sued on a lost bill of exchange cannot be compelled to pay. The various cases are collected in *Hansard v. Robinson* (a), where Lord Tenterden C. J. pronounced an elaborate judgment; the principle of which is, that the acceptor of a bill of exchange only engages to pay on the bill being given up to him as a voucher, for his own security. No distinction can now be taken between a bill of exchange and a promissory note: *Rex v. Box* (b). Patten J. It does not at all follow from *Hansard v. Robinson* (b) that the plaintiff could not have recovered if the lost note had been found.] In the present case the defendant avers that he has always been ready to pay on the production of the note. If he had paid the plaintiff without the production of the note, he could not compel a receipt, because the common law does not require that; nor could he insist upon an indemnity; and he might have no witness of the payment, and then afterwards be sued on the note, and be compelled to pay it a second time. For this reason the law requires the production of the note by the holder at the time of payment. [*Patten* J. Have you looked at *Rolt v. Watson*, 4 Bingh. 273?] There the defendant, who was the acceptor of a lost bill, was sued on the original consideration. The promise made by a party on a promissory note is not to pay under all circumstances, but only on production of the note. That is the intention of all mankind. [Lord Denman C. J. Why? Only because on an assignable instrument he might be called upon to pay twice, but that could not be so here, as the

(a) 7 B. & C. 90; S. C. 9 D. & R. 860.

(b) 6 Taunt. 325.

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note is not made payable to bearer or order. *Littledale J.* How would it be in the case of a bond, which the obligee refused to give up?] That is different, because a bond is governed by the common law, and not by the custom of merchants. *Sed*

Per CURIAM—

Rule absolute.

N. R. Clarke was to have supported the rule.

The QUEEN v. The Select Vestry of ST. MARGARET'S,
LEICESTER (a).

Saturday,
June 22d.

Churchwardens are bound to supply estimates to the parishioners in vestry of the probable amount required for a church rate.

Therefore where a local act substituted a special vestry for the parishioners at large, and authorised them to make church rates, poor rates and highway rates, and the Court of Queen's Bench had issued a mandamus to the select vestry to make a church rate:—
Held, that the refusal of the churchwardens to supply any estimates was a sufficient excuse for disobedience to the writ, as the local act contained nothing to alter the general duties of the churchwardens.

THE mandamus issued in this case (b) in Michaelmas term last, recited section 39 of 2 Will. 4, c. x. (local and personal), the refusal to make a rate, and commanded the select vestry to lay and assess a rate according to the provisions of the act of parliament, of sufficient amount to defray all monies which might be required for the support of the churches of the parish, and for the expenses incident thereto, and for all other purposes to which church rates are by law applicable.

The return stated in substance that the select vestry met in pursuance of the writ on the 27th December, 1838, and that the churchwardens present were called upon to state to the select vestry the amount of money necessary for the purposes mentioned in the writ, and also to furnish an estimate of the works necessary for the support of the church, and of the necessary expenses incident thereto, in order to enable the select vestry to lay a rate according to the act of parliament, of sufficient amount &c., and that at such meeting the churchwardens wholly neglected and refused

(a) Decided during the sittings in banc after this term.

(b) See *ante*, 116.

to state to the select vestry the amount necessary for the purposes in the writ mentioned, or to furnish any such estimate or account, or to give to the vestry any information by which they might ascertain and determine the rate to be laid, whereupon the said vestry meeting was adjourned, in order to afford the churchwardens opportunity to furnish a statement &c.; and the vestry, in obedience to the writ, again assembled on the 31st December, and on the 4th January following, but that on both occasions and from thence hitherto the churchwardens neglected and refused to state the amount necessary, or to furnish such statement, account or information, whereupon the select vestry were unable to obey the said writ, &c.

A concilium having been obtained, after a refusal by the Court to quash the return as frivolous (*a*), the case was set down in the crown paper, and was now argued by

Balguy, for the crown (who proposed to read affidavits of the churchwardens in answer to the return, but was not permitted by the Court). This return sets out in effect exactly the same objections as those relied upon previously, and overruled by the Court. It is therefore a contempt. But, to take the case as *res integra*, why should the churchwardens be called upon to undergo the expense of obtaining estimates? The select vestry can obtain these for themselves as well as the churchwardens. The law casts on them, not on the churchwardens, the duty of making a rate, and they are bound to make a fair rate, for the purposes required in the act. Section 63 of the local act, enacts that the monies to be received by virtue of this act, under the rates called church rates, shall (after payment of the costs, charges and expenses attending the collecting, receiving and managing the same) be paid over by the select vestry to the churchwardens. The select vestry therefore have the power of reimbursing themselves for the expense of estimates, whereas, if the churchwardens should incur

(*a*) See 1 Perr. & Da. 124, note (*b*).

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the expense, a rate required for the purpose would be bad as retrospective. Section 42, which requires every rate to be entered in public books, and to be confirmed by justices, and notice thereof to be given in church; and section 92, which gives every rate-payer an appeal to the select vestry, are clauses which shew that every care has been taken to guard the parish.

Mellor, contra. The last decision in this case (a) proceeded entirely on the ground of the refusal being illusive, which is a point that cannot arise on this return. It is not denied on the other side that estimates ought to be made before a rate is assessed, but it is contended that the select vestry ought to make them. This is not so; the law throws upon churchwardens the duty of obtaining estimates, for no one but the churchwardens and the parson has power to enter the church except during divine service. The only effect of this act is to substitute the select vestry for the parishioners at large, and not at all to alter the character of the churchwardens. In *Prideaux's Parish Officer*, 67, (10th ed. by *Tyrwhitt*,) it is laid down that it is the first duty of the churchwardens to survey the church, and "having taken an account of what repairs they want, and estimated as near as they can the charges which the said repairs may amount to," they are to lay a rate. In *Brettell v. King* (b), where a church rate was appealed against, on the ground of its having been made without an estimate, Sir George Lee was clearly of opinion that an estimate ought to have been made, though in that case the objection did not appear on the libel. It appears by the different cases in the ecclesiastical courts that it has been the constant practice for churchwardens to furnish estimates. *Greenwood v. Greaves* (c), *Veley v. Burder* (d), in which last case the right of the parishioners to have estimates

(a) *Rex v. The Select Vestry of* 548.

St. Margaret's, Leicester, 1 Perr.
& Da. 116.

(c) 4 Hagg. Ecc. R. 77.

(d) See a report of this case by

(b) 2 Lee's Rep. (by Phillimore), G. W. Johnson, Esq.

before making the rate is fully admitted by Dr. *Nicholl*, *arguendo*, and *Harrington v. Stow* is there cited from Dr. *Nicholl's* pamphlet.

It is not contended that precise information should be furnished by the churchwardens, but only such as can be supplied with due regard to convenience. Here, however, the churchwardens have refused any. There is a class of cases which shew that estimates are always necessary, inasmuch as the amount demanded may be in respect of expenses, legal, if not objected to by the vestry, but illegal if objected to, as in the case of an organist, the expenses of which must be voted during each year; *Pearce v. The Rector of Clapham* (a), *Jay v. Webber* (b). It being then the duty of churchwardens to furnish estimates, and the law throwing upon them the exclusive duty of seeing that the church is repaired, Canon 85, *Gibbs. Cod.* 194 (c); the cases *Jarratt v. Steele* (d) and *Lee v. Matthews* (e), shew that no person has a right to enter the church but the minister and churchwardens, and therefore it is clear that the onus cannot lie upon the churchwardens to furnish estimates, which could not be made without committing a trespass. Many duties of a peculiar nature are thrown upon the churchwardens; they are to furnish the sacred elements, and perform other offices of which the vestry cannot ascertain the expense, except upon information of the churchwardens. If they make an insufficient rate in attempting to stay the writ of this Court, they will clearly be in contempt. It is impossible therefore to proceed without the information asked for.

Balguy, in reply. The cases cited do not apply, for the special vestry in this case have duties thrown upon them by the act, and the object of the writ is to enforce obedience to that act. It is conceded that estimates should be prepared, but the act gives the special vestry power, incident-

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(a) 3 Hagg. Ecc. R. 10.

(G 2).

(b) 3 Hagg. Ecc. R. 7.

(d) 3 Phill. Ecc. R. 169, 170.

(c) See also Com. Dig. Eglise,

(e) 3 Hagg. Ecc. R. 174.

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ally, to defray the charge of those estimates, which is a power the churchwardens do not possess.

LORD DENMAN C. J.—I regret that we cannot put an end to the disputes in this case, but both parties seem to stand out for their extreme rights. I think the churchwardens are bound to supply the estimates. As the rate is required not only for church repairs, but for divers other purposes, to which church rates are applicable, I do not see what the vestry could do, without knowing how much money was required. They ought to have been informed as to the current expenses of the churchwardens, and the amount required for church repair and other purposes. I think therefore the excuse set up for disobeying the writ is sufficient. It would seem to follow from the argument on behalf of the crown that the vestry in all cases, when called on for a rate, are bound to make one at once, without any means of knowing how much is required. It is suggested that the special vestry under this act are enabled to furnish themselves with estimates, but on looking into the act I do not find that that is so.

PATTESON J.(a)—Under this act the select vestry are authorised to make not only a church rate, but also the poor and highway rate (sect. 39), and therefore they are in fact only put into the position which the parishioners at large formerly occupied. It seems strange to say that the churchwardens of any parish can come forward and demand any sum whatever as a rate, without supplying any particulars of the purposes to which the rate is to be applied, and that the parishioners are to find out by themselves what the details are. Therefore, unless there is something in this particular act to exempt the churchwardens from the usual liabilities of their office, and I do not find any such provision, they must comply with the demand made, and furnish the best accounts they can.

WILLIAMS J. concurred.

Judgment for the defendants.

(a) *Littledale J.* was at the Central Criminal Court.

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Wednesday,
May 29th.

MANDAMUS to the lord of the said manor and his steward to proceed upon a writ of *patent* at common law, according to the custom of the manor, in which plaintiff, presented at a manor court on the 29th May, 1835, *T. Blundell* was the demandant, *N. Templeman* and *R. Maitland* were the tenants.

Return: that at a court holden for the said manor on the day of August, 1835, on the appearance thereat of *Blundell* and *Templeman* by attornies, and *Maitland* in person, *Templeman* and *Maitland* said that in the making of the writ and in the proceedings thereon, there was an error and irregularity in this, that *Blundell* should have entered the writ in person, and not by attorney; and that there was also an error and irregularity in this, that there was no warrant for attorney, by deed or otherwise, to warrant any person to be attorney for *Blundell* in entering the writ, and *Templeman* and *Maitland* thereupon prayed that the writ and proceedings, for the errors and irregularities aforesaid, might be set aside, reversed and annulled, and that the Court should take no further cognizance of the writ. Whereupon the matters aforesaid, so alleged by *Templeman* and *Maitland* for error, being seen, and by the said Court understood, and deliberation being thereupon had, it appeared to the court that in the entering of the writ, and in the proceedings, there was manifest error. Therefore it was ordered and ordered by the court there that, for the errors aforesaid, the writ and proceedings should be set aside, reversed and annulled, and that the court there would take no further cognizance of the writ and proceedings,

Mandamus to the lord and steward of a manor to hear a plaintiff.

Return: that in 1835 the writ was set aside and annulled for certain errors (stated in the return); that afterwards (in 1838), in obedience to the writ, the defendants heard the plaintiff again, when, for the same errors and others (stated in the return) it was adjudged that the writ had been rightly set aside in 1835, and that they could not take further cognizance of the writ; that therefore they could not proceed in the writ as by the writ they were commanded.

Held, 1st. that the return was not contradictory on the ground

stated both that the writ had been proceeded with in obedience to the writ, and that it could not be so proceeded with; 2d. that the return shewed that judgment had been given, and that this Court could not review it.

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&c., and thereupon accordingly the plaint and proceedings were by the court set aside, reversed and annulled. The defendants further returned that, notwithstanding the proceedings had on the plaint, and the said order and judgment of the court, a general customary court baron of the lord of the manor was holden in obedience to the said writ of mandamus, on the 24th day of October, 1838, and the homage sworn were *A. B.* and *C. D.*; and at the same court on that day came *Blundell* by his said alleged attorney, and thereupon also *Templeman* came by his said attorney, and *Maitland* came in person, against *Blundell*, in the plea in the writ mentioned; and the said *Templeman* and *Maitland* said, that the court ought not further to take cognizance of or proceed upon the plaint in the writ mentioned; first, because they said that, in the making of the plaint and in the proceedings aforesaid, there was an error and irregularity in this, that *Blundell* was not, at the time of the entering of the plaint, or the receipt thereof by the steward, or the enrolment thereof, nor was he then a tenant of the manor, nor had he ever been admitted on the court rolls of the manor as tenant to the lord thereof, and that that fact had been first discovered by *Templeman* and *Maitland* since the holding of the court on the 5th day of August, 1835; and secondly, because that there was also, as they had before alleged, at the said court held on the 5th day of August, 1835, error and irregularity in this, that *Blundell* should have made the plaint (if at all) in person, and not by attorney; and thirdly, because that there was also error and irregularity in this, that there was not at the time of the levying of the plaint any warrant of attorney, by deed or otherwise, to warrant his said attorney to be his attorney in making the said plaint; and fourthly, because it was considered and adjudged by the said court, so held on the 5th day of August, 1835, that the plaint and the proceedings under the same should be, and the same were then by the court set aside, reversed and annulled, and the said court then considered and adjudged that they could take

no further cognizance of the plaint and proceedings, and *Templeman* and *Maitland* prayed that the plaint and proceedings, for the errors and irregularities and reasons aforesaid, might be held altogether for nothing, and that the said court would not take further cognizance, &c. Whereupon the matters aforesaid above alleged by *Templeman* and *Maitland* being seen, and by the court so held on the 24th of October, 1838, understood, and deliberation being thereupon had, it appeared to the court that in the making of the plaint, and in the proceedings, there was manifest error, and also that the court ought not to take further cognizance of the plaint, &c. Therefore it was considered and adjudged by the court there so held on &c., that the plaint and proceedings were rightly set aside, reversed and annulled, at the court so held on the 5th of August, 1835; and it was also considered and adjudged by the court that, for the errors and reasons aforesaid, they ought not and could not, according to law and the practice of the court, take further cognizance of the plaint and proceedings, or further proceed therein, &c. That therefore for the reasons above alleged they could not proceed upon the plaint as they were commanded.

A concilium having been obtained,

Stephen Serjt. (with whom was *Scriven*), now contended that the return was bad. The return is bad in form, as being contradictory and repugnant to itself. The defendants are commanded to proceed in the plaint, or to shew cause why they have not proceeded. Which alternative of the writ have they obeyed? The return states that, in obedience to the writ, they did proceed on the 24th October, 1838, and states afterwards that they cannot proceed in obedience to the writ. Inconsistency is fatal to a return; *Rex v. Mayor of London* (a). In *Reg. v. Mayor of Norwich* (b), to a mandamus to admit one *Dunch* alderman, it

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(a) 9 B. & C. 1; S. C. 4 Mann. & R. 36.

(b) 2 Ld. Raym. 1244.

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was returned that he had been elected, but that he was disapproved of by a court whose approbation was essential, and then returned in conclusion quod non fuit electus: the return was held contradictory. (He then contended that the return was bad in substance; that the court baron was wrong in its decision; but the ground of the judgment given by this Court renders it unnecessary to notice this part of the argument.)

Cresswell (with whom was *Bayley*), contra. The return is not contradictory, and it cannot be disputed that a return may contain many causes, provided they are not contradictory, and that it is sufficient if any one of the causes returned be valid; *Rex v. Mayor of London* (a). All the facts stated in this return may have existed; there can therefore be nothing contradictory in the mere statement that such facts did exist. In *Reg. v. Mayor of Norwich* (b) there was an obvious contradiction in returning that the same party was and was not elected, and the Court said they could not tell which to believe, and therefore awarded a peremptory mandamus. Assuming this return not to be contradictory, it is sufficient that the Court below has come to a judgment, and a peremptory mandamus will not be awarded, although the judgment returned be erroneous; *Rex v. Richardson and Lacy* (c) and *Rex v. Justices of Yorkshire* (d). Even if the return be inconsistent the Court will merely quash it, but will not proceed to award a peremptory mandamus; *Reg. v. The Mayor of Norwich* (b). (He then contended that the judgment was not erroneous.)

Stephen Serjt. in reply. The fair inference from *Reg. v. The Mayor of Norwich* (b) is, that, where a return is inconsistent, so that the Court cannot tell what to believe, the Court will not only quash it, but award a peremptory man-

(a) 3 B. & Ad. 271, per *Parke*
J.; S.C. 1 N. & M. 285.

(b) 2 Ld. Raym. 1244.

(c) 1 Wils. 21.

(d) 7 T. R. 467.

damus. In *Rex v. Richardson and Lacy* (a) the parties returned generally, that they had given judgment. In the present return reasons are given for the judgment, and if they are bad this Court will interfere. Both in that case and in *Rex v. Justices of Yorkshire* (b), it was evident from the return that final judgment had been given, and there were other remedies by certiorari or writ of error. In this case the judgment set out is upon a preliminary point of form, and does not resemble a final judgment (c).

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LORD DENMAN C. J. (after stating the return).—The objection to this return is, that it is contradictory. I think it is not so. It states that judgment had been given upon the plaint, and that afterwards the defendants entertained the plaint again, in obedience to the writ of mandamus, and pronounced a second judgment. The prosecutor cannot complain of their entertaining the plaint a second time, as he himself required it. There is no inconsistency in the return, and *Reg. v. Mayor of Norwich* (d) does not apply. If, then, they have given judgment we have nothing more to do with the matter, it is terminated. We cannot inquire whether they have proceeded erroneously or not, we are not a court of error or appeal from their judgment. The return appears to be not only good but very satisfactory.

LITLEDALE J.—The return is not only sufficient, but as correct as possible. The defendants could not do otherwise than resume the proceedings in the plaint, after this Court had commanded them to do so. At the second hearing the tenant made several objections, one of which had not been made at the first hearing. The Court proceed and, after deliberation, confirm all that had been done


(a) 1 Wils. 21.

(b) 7 T. R. 467.

(c) See *Rex v. Justices of Gloucestershire*, 1 B. & Ad. 1.

(d) 2 Ld. Raym. 1244.

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before. Judgment has been given, and we cannot hold it void and award a peremptory mandamus. I do not pronounce any opinion upon the manner in which the judgment has been entered; it may be a singular judgment, but we cannot review it. Whether it may be reviewed on petition to the lord or otherwise, it is not for us to consider.

PATTESON J.—I see no repugnancy in the return. I confess I have some difficulty in understanding the proceedings set out. But, whether they were regular or not, we have no power to revise them, we are not a court of error from that Court.

WILLIAMS J.—The repugnancy imputed to the return is that, whereas in the former part of it the proceedings are said to have been annulled, in a subsequent part of it they are said to be revived. But it is plain that the defendants proceeded to a rehearing solely in compliance with the writ of mandamus, and that they came to a judgment which, I have no doubt, they considered final. Whether it be correct in form or not, is another question. It appears to have been conceded that the return could not have been questioned, if it had stated that a judgment had been come to, and had said nothing more, and the cases cited distinctly support that proposition; and I think that the merely going into detail has not vitiated that which would have been unexceptionable if stated generally.

Return confirmed.



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COLES and Others, Executors of TEMPERANCE CREED, v.
The Governor and Company of the BANK of ENGLAND.

Monday,
June 3d.

STATE. The declaration stated that *Temperance Creed*, in her life-time, and at the time of her death, was the proprietor of a certain share or interest, to wit, to the amount of 20*l.* 16*s.* 9*d.* in the 3 per cent. consolidated annuities, standing in her name in the public books of the defendants, which had not, nor had any part thereof, at the time when &c. been transferred by *T. Creed*, or the plaintiffs, or any of them, or by any attorney thereunto duly authorised. That at the time when &c. the plaintiffs, as executors, were the proprietors of such share, and thereupon it became the duty of the defendants to permit to be entered in the said books such transfer of the said share, or of any part thereof, as the plaintiffs, or either of them, should require. That *J. Coles* the plaintiff, as such executor, heretofore, with &c. required defendants to permit the said share to be transferred in the said books to the name of one *Shaw*, and to permit to be made in the said books a proper entry of such transfer; that *Coles* was willing to make such transfer, and *Shaw* willing to accept it, whereof defendants then had notice. Yet defendants well knowing &c. refused to make, or permit to be entered, in the said books any entry of such transfer, as the plaintiff *J. Coles* might require, or to permit him to make such transfer. By means whereof &c. Averment, that the will of *T. Creed*, and probate thereof, had been duly entered in the office of the accountants of the Bank of England.

Case against the Bank of England for not transferring, according to 18 *Geo.* 2, c. 9, s. 31, a share of consolidated annuities, the property of the plaintiff's testatrix. Pleas: 1. Not guilty; and 2. That testatrix was not possessed. At the trial it appeared that the testatrix for many years before her death was very old and infirm, and when she received her dividends was accompanied by her nephew, who was a clerk in the bank. He asked for the amount, she signed receipts both in the dividend warrants and in the bank books. It appeared probable that he had paid

from time to time the dividends on her whole stock; but he had at intervals taken another woman to the bank, who personated testatrix, and forged her signature to several transfers.

At the trial the jury found that the testatrix was not proved to have had knowledge of the transfers, but that she had the means of knowledge; that she was guilty of gross negligence in leading the bank to believe that she sanctioned the transfers: and that the bank was not guilty of negligence in transferring without ascertaining her identity more fully. Held, that the facts found constituted an answer to the action, and were maintainable under the pleadings.

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The second count was for not paying 33*l.* 6*s.* 3*d.* as a half-yearly dividend on the above stock, payable on the 5th January, 1831, although sufficient money had been duly issued and received by defendants for the purpose of paying the said dividend.

Pleas : 1. Not guilty. 2 and 3. That *T. Creed* was not, at the time of her death, proprietor of the said stock, in the said counts mentioned. 4. That sufficient money had not been received by defendants for the purpose of paying the said sum of 33*l.* 6*s.* 3*d.* in the second count mentioned. Issues on the above pleas.


The cause was tried before Lord *Denman* C. J. at the London sittings after Trinity term, 1837, when the following facts appeared. Mrs. *Creed*, who died in Sept. 1830, being then about eighty years of age, had, in the year 1828, the sum of 2220*l.* 16*s.* 9*d.* three per cent. consols standing in her name in the books of the defendants. *B. Coles*, one of the executors of her will, and one of the plaintiffs, was her nephew. She had great confidence in him, and employed him generally as her man of business. She herself was very infirm for many years before her death, and was not conversant with matters of business. She always went herself to the Bank of England to receive her dividends. He was a clerk there, and generally attended her on these occasions. He usually asked for the amount of her dividend, and she signed receipts both in the dividend warrants and the bank books, and the warrants were given to him. He had, at different intervals during the last two or three years of Mrs. *Creed*'s life, taken to the Transfer Office of the bank, which is a different office from the Dividend Pay Office, another woman, about forty years of age, who wore a veil and personated the testatrix from time to time, and who then forged the signature of the testatrix to several transfers of portions of the stock, until, at the time of Mrs. *Creed*'s death, the sum of 5*l.* 16*s.* 9*d.* only was left. The sum of 115*l.* transferred in July, 1829, was the last portion of stock so transferred, and no dividend had been received by the testatrix since such

last-mentioned transfer. *B. Coles* had been indicted by the defendants for forgery in respect of this transfer and had been acquitted. It was admitted that before the commencement of this action sufficient money had been received by the defendants from the Exchequer to pay all the dividends then due upon the amount claimed of 2220*l.* 16*s.* 9*d.* three per cent. consols; that the defendants had refused to pay to the plaintiffs the dividend due the 5th of January, 1831, on that sum, or on any sum except 115*l.* the sum last transferred, and on the untransferred residuary sum of 5*l.* 16*s.* 9*d.*; and that defendants had refused to transfer the sum of 2220*l.* 16*s.* 9*d.* at the plaintiff's request, to *Shaw*, as stated in the declaration, although *Shaw* was willing to accept the transfer. His lordship put four questions to the jury:—1. Had the testatrix the means of knowing that the transfers were made?—Answer, Yes. 2. Did she in fact know?—Answer, No; the jury saying they had no sufficient evidence. 3. Was she guilty of gross negligence, leading the defendants to believe that she sanctioned the transfers?—Answer, Yes. 4. Was the bank guilty of negligence in transferring without ascertaining the identity of the testatrix?—Answer, No. His lordship, on this finding, directed the verdict to be entered for the defendants, with leave to move to enter it for the plaintiffs.

Platt, in the ensuing Michaelmas term, having obtained a rule nisi accordingly,

Sir *F. Pollock* and *Bayley* shewed cause (a). The plaintiffs are not entitled to a verdict on the ground that the defendants were bound to transfer the amount of 120*l.*, no dividend having subsequently been received, so as to ratify the fraudulent transfer of that sum; because under the first count they must recover the whole or nothing. That count is not like a count for money had and received, but it charges the bank specially for a breach of duty in refusing to trans-

(a) In Easter Term last (May 3) before Lord *Denman*, C. J. *Little-dale*, *Patteson* and *Coleridge* Js.

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fer the particular sum of 2220*l.* 16*s.* 9*d.* The Bank was not bound to transfer that sum; if the plaintiffs make too large a demand they cannot hold the Bank liable for not transferring any smaller sum. If a merchant draw a bill on his correspondent for a greater amount than such correspondent has in his hands belonging to the drawer, no action would lie for the non-acceptance of the bill. The admissions agree with the count, in neither of them does it appear that the Bank refused to transfer 2220*l.* 16*s.* 9*d.* or *any part thereof*. But the conclusive answer to the present action is, that Mrs. Creed, by going to the bank, after the forged transfers, and accepting dividends on her reduced amount of stock, has been guilty of gross negligence, so as to induce the bank to believe such transfers had been sanctioned by her, and that the bank has been guilty of no negligence whatever in making such transfers. This has been found by the jury, and also that she had the means of knowing that the transfers had been made; it is not even found that she did not actually know, but merely that there is no sufficient evidence that she did know. Means of knowledge are equivalent to knowledge itself for the purposes of the present question; *Bilbie v. Lumley* (a), *Smith v. Low* (b). In *Milnes v. Duncan* (c) it was considered that there were not adequate means of knowledge. Mrs. Creed, then, by her conduct having caused the Bank to believe the existence of a certain state of things, viz. that she had sanctioned the transfers, and having induced the Bank to act in that belief, so as to alter its own previous position, was concluded from averring against the latter a different state of things as existing at the same time; *Pickard v. Sears* (d) and *Gregg v. Wells* (e). *Butterfield v. Forrester* (f) and *Flower v. Adam* (g) are also in point to shew that Mrs. Creed was precluded by her own negligence. In *Davis v. Bank of England* (h) it

(a) 2 East, 469.

(b) 1 Atk. 489.

(c) 6 B. & C. 671; S. C. 9 D. & R. 731.

(d) 2 N. & P. 488.


(e) 2 Perr. & Dav. 296.

(f) 11 East, 60.

(g) 2 Taunt. 314.

(h) 2 Bing. 393.

was held that a party might recover from the Bank of England dividends on his stock, though he knew that it had some months previously been transferred under a forged power of attorney, and omitted to give information to the bank until after the escape of the offender. But that decision was reversed in error (a). In *Stone v. Marsh* (b) stock had been transferred under a forged power, and the produce was paid to the house of the defendants who were bankers. It was held that the money constituted a debt from them to the owners of the stock. On the same principle, if *B. Coles* were now solvent, the plaintiffs might ratify the transfer of stock and follow the money in his hands. There can, therefore, be a ratification of a forged transfer, and there has been in this case. The negligence of *Mrs. Creed* was admissible in evidence under the general issue; *Bridge v. Grand Junction Railway Company* (c), and *Gough v. Bryan* (d).

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Platt, W. H. Watson and Peacock, contra. The plaintiffs can recover a part of the sum of 2220*l.* 16*s.* 9*d.* in this action; the sum is laid under a videlicet, and the substantial charge in the declaration is, that the plaintiffs are entitled to a share of stock, and not to any particular sum of money, and the request to transfer is not traversed.

This action is brought for not transferring stock belonging to the plaintiffs. The defendants say they are not guilty, and that *Mrs. Creed* was not possessed. Have they then transferred at the request of the plaintiffs? for that is the real effect of their pleas. The 18 *Geo.* 2, c. 9, s. 31, says that the stock in question "shall be assignable and transferrable as the act directs, and not otherwise;" and the mode of transfer thereby directed is by entries in the transfer books, to be signed by the parties transferring, or, in their absence, by their attornies authorized by deed attested

(a) 5 B. & C. 185; S. C. 7 D. & R. 463.
 & R. 828.

(c) 3 M. & W. 244.

(b) 6 B. & C. 551; S. C. 9 D. (d) 2 M. & W. 770.

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by two credible witnesses, and no other mode is "to be good or available in law." This enactment, which was obviously intended as a protection to the public, has not been followed. The legislature having said that property should be transferred by one mode only, this Court cannot say it shall pass by any other. It is said that this stock passed from Mrs. Creed by her negligence. How could her negligence change the property? [*Patteson* J. Her assertion through her agent that she had only so much stock might be conclusive evidence against her that she had no more.] *B. Coles* could only be her agent for demanding the *right* amount of stock; and as an agent could not under the statute be authorised by parol, his acts cannot be ratified by parol. If this is put as a case of estoppel, it should have been pleaded. [*Patteson* J. How could you plead matter in pais by way of estoppel?] In *Vooght v. Winck* (a) *Holroyd* J. makes no distinction between matters in pais and other matters. Suppose the owner of property, which has been stolen through his negligence, to bring trover, after conviction of the thief, against a person who has purchased the property, but not in market overt;—would the plaintiff's negligence be any defence in such an action? In *Pickard v. Sears* (b) and the other cases cited the party guilty of negligence had been active in misleading others, he himself having full knowledge of all the facts. In the present case it cannot be doubted that Mrs. Creed, up to the time of her death, was entirely ignorant of the diminution of her stock. In *Davis v. The Bank of England* (c) the owner of stock was allowed to recover, although he had full knowledge of the forged transfer, and connived at the escape of the forger. That case is not at all impugned by *Stone v. Marsh* (d), and was reversed in error solely on the technical ground that the declaration did not allege that the Bank had received from Government the money for paying

(a) 2 B. & Ald. 662.

5 B. & C. 185; S. C. 7 D. & R. 828.


(b) 2 N. & P. 488.

(d) 6 B. & C. 551; S. C. 9 D.

(c) 2 Bing. 393; S. C. (in error),

& R. 643.

of the dividends. In *Marsh v. Keating* (a), where stock had been sold under a forged power, it was held that the owner had an election either to repudiate the transfer or to adopt it and to follow the proceeds. Mrs. Creed's conduct has been treated as a ratification; but means of knowledge are not enough to support the case as a ratification; there must be actual knowledge.

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The defence of negligence should have been pleaded specially. In the cases cited, where it has been held admissible in evidence under the general issue, the question of negligence has been involved in the declaration; the actions themselves were in respect of negligence. The complaint in this case is not that the Bank has negligently transferred to others, but that it will not transfer to the plaintiffs, and the negligence of the plaintiffs could not be given in evidence either under a plea denying the complaint generally, or under the special plea denying the property of the plaintiffs.

Cur. adv. vult.

LORD DENMAN C.J. now delivered the judgment of the Court; and, after stating the pleadings and facts as above, and that it appeared from these facts that *B. Coles* must have paid Mrs. Creed the full dividend that would have been due to her if the original amount of stock continued in her name, proceeded thus:—The action was founded on the 18 Geo. 2, c. 9, creating the stock, and especially on the 31st section, which enacts that the stock shall be transferred by the party's signature, as there prescribed, and in no other manner whatsoever; and reliance was placed on *Davis v. The Bank of England* (b), where the Common Pleas, acting on that principle, allowed plaintiff, a stockholder, to recover the amount of his stock against the Bank, though there was some kind of evidence of an adoption by the plaintiff of the forgery, by which defendants had been induced to place several purchasers on their books in lieu of plaintiff, as holders of the

(a) 1 Bing. N. C. 198.

(b) 2 Bing. 393.

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same stock. That case was reversed in error (*a*) on the form of two of the counts, but the general doctrine does not appear to have been impeached; indeed it is hardly more than the language of the act of parliament, though exceptions to it may arise out of particular circumstances. It might be added that the statutory provision in nowise differs from the common law liability of the banker to pay the money which he keeps for his customer, when some stranger, by a forgery, has abstracted the amount from his possession. The defence was mainly upon the general issue, and was said to be made out by the facts already recited. The argument was, that testatrix had, by gross negligence, brought about, or at least greatly contributed to produce the loss which has accrued, so that her representatives are precluded from complaining of the Bank in respect to it. The proof of this was said to result from the facts found by the jury on questions which I submitted to them, namely, that testatrix, though she was herself defrauded, and did not know of the diminution of her stock, yet had the means of knowing it, and was guilty of gross negligence in receiving the dividends on the reduced sums without objection, and that the Bank was not guilty of any negligence in making the transfers and paying the dividends. In these particulars the case bears a strong resemblance to *Hume v. Bolland*, as reported in *Ryan & Moody*, 375, which was not mentioned in the argument here, where bankers had in their books credited their employers with dividends as received, and were held to be bound by their own entries, though the money had never been received by the house, but had been fraudulently obtained by one of the partners, and kept for his own use; *Best* C. J. asking the jury whether the plaintiffs had acted negligently, which the verdict negatived,—whether the bankers had not acted with gross negligence, which the verdict affirmed. The case of *Hume v. Bolland*, which was an issue directed by the Chancellor, does not appear to have been satisfactorily decided at *Nisi Prius*, for the facts found

(*a*) 5 B. & C. 185; S. C. 7 D. & R. 828.

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in the trial were afterwards stated in a case laid before the Court of Exchequer (*a*), which held that the amount of the monies so credited could not be proved by the trustees as a debt against the bankers' estate. But this was on the ground that the bankers had never received the money at all, and that the trustees might still recover the dividends against the Bank, who had parted with them without any authority. The question of negligence did not there appear necessary for the decision; but the doctrine that parties guilty of negligence, which alters the rights of others, may be bound by it, was fully recognized. It was not sufficient to convert a false entry by one partner into proof that the money was received by all; yet it would, consistently with that case, protect a party sued for a wrongful refusal to do that which it had disabled him from doing. Precisely the same doctrine was laid down by the same learned Chief Justice and the whole Court of Common Pleas in *Davis v. Bank of England* (*b*), to which plaintiffs have recourse on this occasion. We agree "that if it had appeared that the bank had paid these dividends to persons to whom (if plaintiff had informed them of the forgeries, as he ought to have done) they could have refused to pay them, he cannot recover such dividends in this action;" "but we say that it does not appear that they have so paid them; no evidence of such payment appears." If then it had appeared that through the default of *Davis* the Bank had paid away his dividends, he would not have been entitled to recover. Now in this case the jury have in effect found that testatrix's gross negligence led the Bank to believe those transfers duly made of which her executors now complain. The facts then which have been found by the jury in this case entitle defendants to a verdict on the plea of not guilty. They also furnish evidence on the second and third pleas, in which it is alleged that testatrix was not a proprietor of the stock; for we are of opinion that notwithstanding the strong words of

(*a*) 1 C. & M. 130; S. C. 2 Tyr. 575.

(*b*) 2 Bing. 393.

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the 18 Geo. 2, a stockholder may so conduct himself as to be precluded from claiming in that character; *ex. gratia*, the transfer is only to be made by underwriting "by the parties, or in their absence by lawful attornies, appointed with certain formalities;" but suppose the proprietor being present had not underwritten the transfer, but had connived at the underwriting of his name by another, or being absent, had expressly requested another to go and sign his name,—the act would not have been complied with, yet the property would have passed from the stockholder. In such a case indeed fraud would have been an ingredient, but I apprehend that any culpable conduct, by which the relation of the parties to the property is completely altered, will have the same effect. The verdict must be the same on the last plea also, of which the meaning is that defendants have been induced by the conduct of testatrix to become responsible to others for that fund which they had possessed for her use, and to part with the money which they had received from Government to pay her dividends. Leave was reserved at the trial to enter a verdict for the plaintiffs, not only on those general points, but also on the refusal to transfer the sum of 120*l.* 16*s.*, the last remnant that testatrix had left standing in her name. But on looking at the admissions, we do not find that any specific demand to this effect was made; so that there could be no wrongful refusal to comply with it.

Rule discharged.

END OF TRINITY TERM.

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EXTRA SITTINGS AFTER TRINITY TERM.

FLIGHT and another v. THOMAS.

Friday,
June 14th.

CASE. The second count of the declaration charged that the defendant wrongfully and injuriously had caused and procured divers offensive stenchs to come in and about the plaintiffs' dwelling-house, whereby it was rendered unfit for habitation.

To declaration in case for causing offensive stenchs to come over the plaintiff's land, the defendant pleaded that he occupied premises adjoining those of the plaintiff, and for twenty years next before the commencement of the suit had enjoyed of right, and without interruption, the benefit of using a mixen on his own premises, near to premises of plaintiff, that thereby stenchs necessarily arose, and that, in using the mixen at the times when, &c., stenchs necessarily arose, which were the grievances complained of:—Held, that the plaintiff was entitled to judgment non obstante verdicto, as the plea did not state that the

Plea: that, before and at the time of the committing of the grievances mentioned, defendant was in the occupation of premises adjoining the said premises of plaintiffs. That defendant and his predecessors, the occupiers for the time being of his premises, for the full period of twenty years next before the commencement of this suit, had enjoyed as of right, and without any interruption, the benefit and advantage of having and using a certain mixen in and upon the premises of defendant, contiguous to the premises of plaintiffs, for the more convenient occupation of the premises of defendant, and thereby, during all that time, divers stenchs necessarily arose from the mixen. That defendant, being so in the occupation of his premises, and having occasion to use the mixen in manner aforesaid, at said several times when &c. did use the mixen for the more convenient occupation of the premises of defendant, as he lawfully might, and, by reason of such last-mentioued use of the mixen, at said several times when &c. the stenchs necessarily arose from the mixen, which are the same grievances whereof plaintiffs have above complained. Verification.

Replication: that defendant and his predecessors &c. the occupiers &c. for the full period of twenty years next before the commencement of this suit, had not enjoyed, as of right and without interruption, the benefit and advantage of having and using said mixen in and upon the premises of

stenchs had for twenty years passed over the *plaintiff's land*.

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defendant, adjoining premises of plaintiffs, for the more convenient occupation of the premises of defendant modo et formâ. Issue thereon.

The cause was tried at the Dorsetshire spring assizes, 1838, when the defendant obtained a verdict.

Manning, in the following term, moved for a rule nisi to enter judgment for the plaintiff on this issue, non obstante veredicto. The first section of 2 & 3 Will. 4, c. 71, relates to profits alieno solo. The second section relates to easements to be enjoyed alieno solo, and protects them after enjoyment for twenty years without interruption. The right claimed by the plea in this case is to do something on the defendant's own land. The third section contains the only provision which protects a claim proprio solo, and is applicable to the enjoyment of light only. He then cited *Fitch v. Rawling* (a) and *Popham v. Woolcot* (b).

A rule nisi having been granted,

Barstow now shewed cause. This plea is framed on the second section of the act; and the question is, whether it asserts a claim to what may properly be called an easement. It is said that the right asserted is not an easement, because it is to continue something on the defendant's own land, from which proceeded the stench complained of. But at common law a grant might have been made of the privilege claimed, which is like the right to pass smoke over the land of another. It matters not that the subject-matter (the stench) is not perceptible to sight or touch. "Rights of accommodation in another's land, as distinguished from those which are directly profitable, are properly called easements:" *Burton's Real Property*, (3d ed.) 386. [*Coleridge J.* The plea does not state that the stench has traversed the plaintiff's land for twenty years. The mixen may have been established twenty years ago, and yet the stench has not gone over the boundaries of the

(a) 2 H. Bl. 393.

(b) 1 Sid. 291.

plaintiff's land until a more recent period.] It certainly is not stated that they did; but this plea is to be supported after verdict.

Erle and *Manning*, contra, were not called upon by the Court.

Lord DENMAN C. J.—The plea is bad, and is not cured by giving the defendant credit for having proved every allegation contained in it.

LITTLEDALE, PATTESON and COLERIDGE Js. concurred.

Rule absolute.

SWANN v. SUTTON.

Thursday,
June 20th.

DEBT for goods sold and delivered, work done, money paid, and on an account stated. Plea: that the plaintiff ought not further to maintain his action, because after the causes of action accrued, and after the commencement of the suit, to wit, on &c., the plaintiff took the benefit of the Insolvent Debtors' Act, and duly assigned to *Samuel Sturgis*, the provisional assignee, of, and amongst other things, all the real and personal estate, right, title &c. of the plaintiff &c. Averment that, by force of the said act and assignment, all the estate, right &c. of the plaintiff, of and in and unto the said debt and causes of action in the declaration mentioned, vested in the said *Samuel Sturgis*, as such provisional assignee as aforesaid. Verification.

To a plea alleging that the plaintiff had taken the benefit of the Insolvent Debtors' Act, since the commencement of the action, a replication that the action is carried on for the benefit of his assignees is bad.

Replication: *precludi non*; because after the assignment so made to the said *S. Sturgis*, he, *Sturgis*, had express notice of this suit commenced and prosecuted against the defendant, and of the cause for which the same had been and was commenced. And that after *Sturgis* had had such notice and from thence until the making of the indenture

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hereinafter mentioned, he, *Sturgis*, suffered and permitted the said suit to remain and continue pending and to be prosecuted and carried on by and in the name of the plaintiff. The replication then stated, that after the plea pleaded, to wit, on &c. *W. W.* and *E. B.* being creditors of the plaintiff, were duly appointed assignees of the estate of the plaintiff, and that by indenture of assignment *Sturgis* conveyed all the estate &c. which by virtue of the conveyance in the plea mentioned was vested in him. The plaintiff then averred that the said assignees had express notice of the said suit so commenced and prosecuted and depending as aforesaid, and of the causes for which the same had been and was so commenced, and that they expressly assented to the suit and that the same and the proceedings therein should be continued and prosecuted by the plaintiff for and on behalf of the said assignees, and for the benefit of the several creditors of the plaintiff at the time of his taking the benefit of the act &c. And the plaintiff avers that the same is now continued and prosecuted in his name with the express privity and approbation and consent of the said assignees, and for and on their behalf. Verification.

Demurrer and joinder.

Crompton in support of the demurrer. The law has been settled ever since *Kinnear v. Tarrant* (a), that after the commencement of the action it is a good plea in bar that the cause of action has vested in the plaintiff's assignees. With regard to subsequently acquired property, it is true that a bankrupt may sometimes sue in his own name: *Drayton v. Dale* (b), *Taylor v. Buchanan* (c); or the assignees may sue in his name, if a warrant of attorney has been given to him before his bankruptcy to enter up judgment in his own name, *Guinness v. Carroll* (d). It was formerly

(a) 15 East, 622.


(c) 4 B. & C. 419; S. C. 6 D.

(b) 2 B. & C. 293; S. C. 3 D. & R. 491.

& R. 534.

(d) 1 B. & Ad. 459.

thought that, if the action was commenced by the bankrupt before the bankruptcy, the assignees might carry it on for their own benefit in his name; but it was held in *Kinnear v. Tarrant* (a), confirming *Barnes v. Maton*, there cited, that, if the defendant pleaded the plaintiff's bankruptcy in bar, he was entitled to judgment; and *Bibbins v. Mantel* (b), was there distinguished on the ground that the plaintiff there had obtained interlocutory judgment before his bankruptcy, and therefore the defendant had no day in court to plead the bankruptcy. *Biggs v. Cox* (c), and *Baylis v. Hayward* (d), are authorities to the like effect, in the former of which cases, *Bayley J.* assigned this reason—that the defendant was entitled to see on the record to whom payment on the judgment was to be made. *Lea v. Telfer* (e), shews that the case of an insolvent is in this respect analogous to that of a bankrupt, as the assignment in each case vests all the personal estate and rights in the assignees.

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Archbold contra. It was suggested for the first time in *Kinnear v. Tarrant* (f) by *Marryatt*, *arguendo*, that there was a distinction in the case of interlocutory judgment, because after that the defendant had no day in court, but the judgment of the Court did not proceed on that point. Lord *Tenterden C. J.* has held several times in this Court, that the assignees may go on with the action if they choose, and it would be very hard upon the creditors if they were forced to commence a new action. In *Waugh v. Austen* (g), where the plaintiff became bankrupt after interlocutory and before final judgment, and sued out execution, the Court refused to set it aside, and the Court said they had several times permitted the assignees to continue a suit commenced

(a) 15 East, 622.

(b) 2 Wils. 358.

(c) 4 B. & C. 920; S. C. 7 D. & R. 409.

(d) 4 A. & E. 256; S. C. 5 N. & M. 613.

(e) 1 C. & P. 146.

(f) 15 East, 622.

(g) 3 T. R. 437.

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by a bankrupt in his own name. *Bibbins v. Mantel* (a) is an equally strong authority, and *Kretchman v. Beyer* (b) shews that the assignees cannot make themselves parties to the record till after interlocutory judgment. *Guinness v. Carroll* (c) is a much stronger case than the present. There, to an action of debt on an Irish judgment, the defendant pleaded that the judgment was entered up on a warrant of attorney, and that before entering up judgment the plaintiff became a bankrupt, and that the debt had vested in his assignee who had brought an action of debt on the judgment which was still pending; yet the plea was held bad. *Biggs v. Cox* (d) is not applicable, because, although the assignees may if they choose continue the action commenced by the bankrupt, they are not compellable to do so. It is every day's practice for a bankrupt plaintiff to be called on to give security for costs where the action is carried on by the assignees. [*Patteson J.* In *Minchin v. Hart* (e), where the plaintiff became bankrupt before plea pleaded, and the defendant obtained an order for giving security for costs, and afterwards pleaded the bankruptcy in bar, the Court refused to strike out the plea, which is a strong authority against you. It seems very hard if this action should be allowed to go on; for suppose the plaintiff to recover and the assignees to bring a fresh action, the defendant could not plead a former recovery.] It is submitted that he might; if the assignees resist giving security for costs, as in *Minchin v. Hart* (e) it shews that they do not adopt the action, and therefore of course the plea of bankruptcy is valid.

Crompton in reply. The cases relied on by the plaintiff were all pressed on the Court in *Kinnear v. Tarrant* (f) without effect, and were considered by *Bayley J.* in *Biggs*

(a) 2 Wils. 358.

(b) 1 T. R. 463.

(c) 1 B. & Ad. 459.

(d) 4 B. & C. 920; S. C. 7 D. & R. 409.

(e) 1 Chit. R. 215.

(f) 15 East, 622.

v. Cor (a), to have been overruled by it. No doubt the assignees may continue an action commenced by the bankrupt, but the question is, whether this plea is not valid if pleaded. In *Minchin v. Hart (b)*, it was clearly considered that the plea was a bar. [He was then stopped by the Court.]

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LORD DENMAN C. J.—We think the plea is a good defence. The right to maintain this action was transferred by the assignment, and it is impossible to hold that the practice of the Court in requiring security for costs, when the action is carried on in the name of the bankrupt, can affect the validity of this plea.

LITTLEDALE J.—The plea shews that the plaintiff is not entitled to maintain this action. The cause of action vested before the bankruptcy; if the assignment had taken place before the writ issued he could not have commenced the action, and, as it has taken place since and before plea pleaded, he cannot continue the action. In *Minchin v. Hart (b)* and *Bretherton v. Osborne (c)*, it seems to have been taken for granted that a similar plea was good. There is no distinction in these cases between an insolvent and a bankrupt.

PATTESON J.—No practice with regard to costs can enable us to deprive a party of the right of pleading a valid plea. If any authority were wanting it is supplied by *Minchin v. Hart (b)*.

Judgment for the defendant.

(a) 4 B. & C. 920; S. C. 7 D. & R. 409.

(b) 1 Chit. Rep. 215.

(c) 1 Dowl. P. C. 462.

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*Saturday,
June 15th.*

LUNNISS v. Row.

Where the objection to the competency of a witness (such as an accommodation drawer of a bill) appears on the record, his competency is restored by his statement that he has a release without producing it.

INDORSEE against the acceptor of a bill of exchange, drawn by one *James Smith*, and indorsed by him to the plaintiff. Plea: that the defendant accepted the bill for the accommodation of *Smith*, and that *Smith* indorsed the bill for a special purpose to the plaintiff, for the sole use and benefit of *Smith*, to wit, that the plaintiff might get the bill discounted for *Smith* before the bill became due, and pay the proceeds upon such discounting to *Smith*, for his own benefit; and that the plaintiff did not discount the bill, but in violation of good faith and without the consent of *Smith*, omitted to return the bill to *Smith*, and detained the same under colour that he would destroy it; and the defendant says the plaintiff is fraudulently suing upon the said bill, without having ever given any value for it. There were other pleas, which it is unnecessary to mention.


At the trial, before Lord *Denman* C. J., at the sittings in London, after Trinity term, 1838, *Smith* was called as a witness by the defendant. He stated that he had a release, which had been prepared by the defendant's attorney, but that he had not read it through. It was contended that the release should be produced, as the objection to the witness appeared on the record. His lordship overruled the objection and indorsed the witness's name on the back of the record. The verdict passed for the defendant, and his lordship gave leave to move to enter a verdict for the plaintiff. A rule nisi having been obtained accordingly, in Michaelmas term, on the ground that the release should have been produced, and that the 3 & 4 *Will.* 4, c. 42, did not make the drawer of an accommodation bill a competent witness;

Butt now shewed cause. The objection to the witness in this case arose in effect on the *voire dire*, and therefore his competency might be restored by his parol statement.

It is true that in *Goodhay v. Hendry* (a), which was an action by the assignees of a bankrupt, *Best* C. J. held that the bankrupt was not rendered competent by his statement that he had obtained his certificate and released to the assignees, but that both certificate and release should be produced. That case however was overruled by *Parke* J. in *Wandless v. Cawthorne* (b), and cannot be supported. In *Carlisle v. Eady* (c), where a similar objection was taken to a bankrupt, *Park* J. said, that in all the years he had known Guildhall he never knew such a release called for. In *Quarterman v. Cox* (d), *Coleridge* J. thought that if the release were in Court it ought to be produced, but not otherwise; and in *Vivian v. Humphreys* (e), which was tried three times in Cornwall, where a witness stated on the *voir dire* that he was interested and left the box, and on his return stated that he had been released, it was held sufficient.

2. Even if *Smith* was incompetent, his competency was restored by indorsing his name on the back of the record; *Faith v. M'Intyre* (f), (where the attention of *Parke* B. was called to the contrary decision of Lord *Lyndhurst* C. B., in *Burgess v. Cuttill* (g),) *Yeomans v. Legh* (h).

R. V. Richards and *Whitehurst*, contra. The authorities are contradictory, but the principle is quite clear. Where an objection is taken to the competency of a witness on the *voir dire*, there, no doubt, the objection may be removed by secondary evidence, but, where the objection to the witness appears on the record, as in this case, then the ordinary rules of evidence apply, and the objection must be removed by production of the best evidence. *Goodhay v. Hendry* (a) is confirmed by an anonymous case before *Tindal* C. J., mentioned in a note to that case. His lordship there said, "The difficulty is, that the objection does not arise on

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(a) Moo. & Malk. 319.

(b) Moo. & Malk. 321, n.

(c) 1 C. & P. 234.

(d) 8 C. & P. 97.

(e) Not reported.

(f) 7 C. & P. 44.

(g) 6 C. & P. 282.

(h) 2 M. & W. 419.

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the *voire dire*, but from the opening of the case for the plaintiffs, and from the pleadings themselves." There are few decisions on the point, because it is only since the new rules that the fact of the witness being an accommodation drawer would appear on the record.

LORD DENMAN C. J.—The first point is in fact settled by practice, and my experience, though much less than that of my late brother *Park J.*, entirely confirms his observation. It is therefore unnecessary to hear any argument on the second point.

LITLEDALE J.—I do not see any reason in the distinction as to the objection to a witness appearing on record or not. I admit there has been a notion, that, when the objection appears on record, secondary evidence is insufficient to remove it. But there is not much difference in principle between the two cases, and in practice there has been none.

PATTESON and WILLIAMS Js. concurred.

Rule discharged.

Monday,  
 June 17th.

EVANS v. FRYER.

Declaration on a wager stated that plaintiff bet defendant that a railroad would be completed by a certain day, "for the general conveyance of passengers."

The wager proved was simply that the railroad would be completed by the day. The judge who tried the cause amended by striking out of the record the words "for the general conveyance of passengers:"—Held, that the amendment was properly made, as the amended declaration increased the plaintiff's burden, by rendering it necessary for him to prove that the road was completed for *all* its purposes, and that therefore, as far as the defendant was concerned, the amendment had not been made in "any material particular."

**ASSUMPSIT** to recover the amount of a wager alleged to have been lost by the defendant to the plaintiff. The declaration stated that, in consideration that the plaintiff at the request of the defendant had promised to pay him 50*l.* if a railroad was not completed for the general conveyance of passengers to and from Liverpool and Birmingham, in

six years, from the 14th July, 1831; the defendant then promised the plaintiff to pay him 150*l.* if a railroad was completed for the general conveyance of passengers to and from Liverpool and Birmingham in six years, from the said 14th July. Averment, that the railroad was completed as aforesaid, at the time mentioned. Pleas: 1. Non assumpsit; 2. That the railroad was not completed for the general conveyance of passengers in six years from the 14th July, 1831.

At the trial before *Park J.*, at the Warwickshire spring assizes, 1833, it appeared that the terms of the wager were, that a railroad would be completed in six years &c., without the additional words "for the general conveyance of passengers." The learned judge, at the request of the plaintiff, but without the consent of the defendant, amended the record by striking out the last-mentioned words. Verdict for the plaintiff. The defendant had leave to move to enter a nonsuit.

*Humfrey*, in the following term, having obtained a rule nisi,

*Goulburn Serjt.* and *J. Hildyard* now shewed cause. The 3 & 4 *Will.* 4, c. 42, s. 23, allows amendments to be made "in any particular or particulars in the judgment of such court or judge not material to the merits of the case, or by which the opposite party cannot have been prejudiced." The defendant could not have been prejudiced by this amendment, for it was advantageous to him, as the plaintiff, after the qualifying words had been struck out of the declaration, was bound to satisfy the jury that the railroad was completed, by the time in question, for every purpose. Nor was the amendment made in any particular material to the merits of the case. "Unless the judges are very liberal in the allowance of amendments, the rule which binds a plaintiff to one count will operate very harshly;" *Sainsbury v. Matthews* (a), and *Whitwill v. Scheer* (b). In

(a) 4 M. & W. 343.

(b) 3 N. & P. 398.

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the latter case the defendant, who objected to the amendment, made an affidavit that he went down to try the issue contained in the averment ordered to be amended.

*Humfrey and Waddington, contra.* The amendment was not for the defendant's benefit. The declaration in the amended form stated the wager to be that the *railroad* was to be completed. That allegation would have been satisfied by proof that the mere rails were completely laid down; whereas the original form of the declaration threw it upon the plaintiff to prove not only that the rails, but that all the other railroad apparatus was complete, so as to be available for the general conveyance of passengers. The particular in which an amendment is made must be both "not material to the merits of the case, *and* by which the opposite party cannot have been prejudiced."

LITLEDALE J.(a)—I think that this rule should be discharged. The amended declaration increased the burden of proof. But on whom did the increased burden fall? On the plaintiff. The defendant therefore was not prejudiced by the amendment.

PATTESON J.—I should doubt whether the amendment had been properly made, if it diminished in any degree the plaintiff's burden of proof. It cannot be considered to have done so, unless the amended declaration be interpreted in the way contended for by the defendant. But I think it would be trifling to say that the wager that the railroad should be completed by a certain day does not mean that it should be completed so as to be used for all its intended purposes. In this view the plaintiff's burden of proof was increased by the amendment. The defendant, therefore, cannot say the amendment was material as far as *he* was concerned. If he had gone to trial because he relied on

(a) Lord Denman C. J. had left Court during the argument.

the point now suggested, thinking the plaintiff would be unable to satisfy the terms of what the defendant conceived to be the more extensive wager, that should have been stated, and the Court might have been applied to on that ground.

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WILLIAMS J.—I quite agree with the counsel for the plaintiff, that we should be liberal in allowing amendments of this kind. Let the contract be ever so ambiguous, the party declaring upon it must elect and fix upon a single meaning to be given to it, and must not have more than one count to set it forth. If amendments were not liberally allowed, the hardship of the new rules would be most grievous, and the merits be in constant peril of strangulation by the pleadings. I quite agree with my brother *Patteson* that it would be trifling to interpret “completing the railroad” to mean nothing more than completely laying down the rails; the words must mean completing the road for all purposes.

Rule discharged.

CALVERT v. MOGGS.

Friday,  
June 21st.

DEBT for goods sold and delivered, money had and received, and on an account stated (a). Plea: that defendant does not owe the said sums of money, or any part thereof *modo et formâ*. Special demurrer setting out for cause that the plea is a plea of *nil debet*, which by the rules of pleading is not allowed in any action.

1. Where to debt for goods sold and on an account stated the defendant pleaded *nil debet*, and on special demurrer suggested in argument that the general issue was given by the

(a) The declaration was filed 10th March, 1838.

Highway Act (5 & 6 Will 4, c. 50, s. 109) to the surveyor of highways in actions brought for anything done in pursuance of the act, and that the plaintiff had waived the tort and sued the defendant, or surveyor, for money had and received:—Held, that, as the count on an account stated could not be brought within the statute, the plea was bad.

2. Where a statute gives the plea of the general issue for anything done in pursuance of the act, the plaintiff cannot oust the defendant of this plea by waiving the tort and suing in contract.

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*Wightman* appeared in support of the demurrer, and relied on the rule Hil. 4 *Will.* 4, No. II.


*Peacock*, contra. The plea is pleaded by virtue of the new Highway Act (5 & 6 *Will.* 4, c. 50, s. 109), and therefore the new rules do not apply; *Earl Spencer v. Swannell*(a). The new Highway Act enacts (sect. 51) that the surveyor of highways may take and carry away materials lying upon any lands for the repairs of the highways, within the parish for which he is surveyor, without making satisfaction for the same; and section 109 enables the general issue to be pleaded to any action brought for any thing done in pursuance of the act. The defendant is a surveyor of highways, who has taken stone from the plaintiff's land; but the plaintiff, instead of bringing an action of tort, where it is clear the defendant would have been enabled to plead the general issue, waives the tort and brings money had and received, but by so doing he cannot oust the defendant of the benefit of the statute. Under nil debet the defendant might give in evidence that he had not had the twenty-one days' notice of action required by section 109, which is of great importance, because with such notice the surveyor, under section 111, might levy a rate and supply himself with funds to meet all demands for contracts made by him. If indeed it were to be contended that the matter in respect of which the defendant is sued was not for any thing done under the statute, the plaintiff should have taken out a summons to strike out the plea.

*Wightman*, in reply. If this plea is good, any one who is sued for goods sold and delivered may plead nil debet, and allege that it is in respect of some statute. [*Little-dale J.* There is a case of *Greenway v. Hurd*(b), where money had and received was brought against an excise officer to recover duties erroneously levied by him, and it was held that he was entitled to notice of action, although it

(a) 3 M. &amp; W. 154.

(b) 4 T. R. 553.

was contended that the statute 23 Geo. 3, c. 70, s. 30, only extended to actions of tort.] The 51st section of the present statute does not apply to goods sold at all. [*Patteson* J. If the action is really founded on that section, and the plaintiff chooses to turn his case into a contract, he cannot thereby deprive the defendant of the defence given him by statute.] At all events, as the declaration contains a count on an account stated, no statute can give the defendant power to plead *nil debet* to that. [*Patteson* J. Ought not you to have taken out a summons to strike out the plea?] *Smedley v. Joyce* (a) shews that the plea is bad on special demurrer.

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The COURT then asked *Peacock* if he could bring the account stated within the statute.

*Peacock*. Section 111 enables the vestry of a parish to defend any road indictment, and the surveyor to charge in his accounts the expenses of the defence. There may therefore be an account stated by the attorney for the defence with the surveyor, which would bring such an account within the act. The demurrer is to the whole plea, and is too large if the plea be good to any count; *Spyer v. Thelwell* (b), *Webb v. Baker* (c).

LORD DENMAN C. J.—It is true that there might be an attorney's bill and an account stated upon it, in respect of the defence of an indictment, but it is evident that that would be wholly collateral to any thing done in pursuance of the statute, and therefore the plea of *nil debet* to that count is bad. And as that plea is pleaded to the declaration generally, it cannot be objected that the demurrer is general also.

LITTLEDALE, PATTESON and WILLIAMS Js. concurred.

Judgment for the plaintiff.

(a) 2 C. M. & R. 721.      (b) 2 C. M. & R. 692.      (c) 3 N. & P. 87.

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To an action against the acceptor of a bill of exchange, he pleaded that before &c. he was indebted to the plaintiff on an account stated, that it was corruptly agreed that defendant should pay part of the debt, and should have three months' forbearance, and accept a bill at that date for payment of the residue, and should pay a sum (exceeding 5*l.* per cent.) for such forbearance, and that the stipulated sums were paid and the bill in question was given accordingly:—  
Held, that the transaction was exempted from the usury laws by 3 & 4 *Will.* 4, c. 98, s. 7.

## KING v. BRADDON.

**ASSUMPSIT** on a bill of exchange, drawn by one *Welch*, for 106*l.* 1*s.* 6*d.*, payable to his order three months after date, accepted by the defendant, and indorsed by *Welch* to the plaintiff.

Plea: that before and at the time of making, accepting and indorsing the bill of exchange in the declaration mentioned, in manner and form as therein alleged, the defendant was indebted to the plaintiff in, to wit, 120*l.* 16*s.*, upon an account before then stated between them, and that thereupon, and before the making or accepting or indorsing of the said bill of exchange, to wit, on the 20th of June, 1838, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the plaintiff, the defendant, and the said *Welch*, that the defendant should then pay to the plaintiff a certain sum of money, to wit, the sum of 14*l.* 14*s.* 6*d.*, in part reduction and discharge of the said debt, and that the plaintiff should forbear and give day of payment of the residue of the said debt, being the sum of 106*l.* 1*s.* 6*d.*, to the defendant for a certain space of time, to wit, for the space of three months then next following, and that the defendant, for such forbearance and giving day of payment of the residue of the said debt as aforesaid, for the time aforesaid, should then give and pay to the plaintiff a certain sum of money, to wit, the sum of 5*l.* 5*s.* 6*d.*, and also that the said bill of exchange, in the said declaration mentioned, should be made, accepted and indorsed to the plaintiff, in manner and form as is therein alleged, as a security for the payment of the said residue of the said debt, at the expiration of the time last aforesaid. That in pursuance of the said corrupt and unlawful agreement, he the defendant did then, to wit, on the day and year aforesaid, pay to the plaintiff, and the plaintiff in like pursuance thereof did then accept and receive of and from him the defendant the said sum of

14*l.* 14*s.* 6*d.*, in part reduction and discharge of the said debt of 120*l.* 16*s.*, so due and owing from him the defendant to the plaintiff as aforesaid, and that for the plaintiff's forbearing and giving day of payment of the said residue of the said debt, being the said sum of 106*l.* 1*s.* 6*d.*, to him the defendant, for the said space of three months then next following, he the defendant, in further pursuance of the said corrupt and unlawful agreement, did then, to wit, on the day and year aforesaid, give and pay to the plaintiff, and the plaintiff, in like further pursuance thereof, did then accept and receive of and from the defendant, the said sum of 5*l.* 5*s.* 6*d.*, and also in further pursuance of the said corrupt and unlawful agreement, the said bill of exchange, in the said declaration mentioned, was then, to wit, on the day and year aforesaid, made, accepted and indorsed to the plaintiff; and the plaintiff, in like further pursuance of the said corrupt and unlawful agreement, did then receive the same as a security for the payment of the said residue of the said debt at the expiration of the time in that behalf aforesaid. And the defendant further says, that the said sum of 5*l.* 5*s.* 6*d.*, so as aforesaid agreed to be and which was as aforesaid given and paid to the plaintiff for the forbearance and giving day of payment of the said sum of 106*l.* 1*s.* 6*d.* for the said space of three months, exceeds the rate of 5*l.* for the forbearing and giving day of payment of 100*l.* for one year, contrary to the form of the statute in such case made and provided. By means of which said several premises, and by force of the said statute, the said bill of exchange in the said declaration mentioned was and is wholly void in law. Verification.

Special demurrer, on the ground that, although it is stated in the declaration that the said bill of exchange therein mentioned was drawn and made payable at three months after the date thereof, and it appears in the declaration and plea that, at the time of the defendant's accepting the same, it had not more than three months to run, yet the defendant hath, in and by his plea, stated and insisted

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on as a ground of defence matters, which, if true, since the passing of a certain act of parliament, made and passed in the fourth year of *William* 4th, intituled "An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges for a limited Period under certain Conditions," and a certain other act of parliament, passed in the first year of the reign of her present Majesty, intituled "An Act to exempt certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury," have been and are wholly inoperative as a defence to an action on any bill similar to that set forth in the declaration. Also on the ground that, if the defendant intended to insist that he had accepted no such bill as came within the protection of the above-named statutes, he should have traversed and denied the statement in the declaration, that he had accepted such a bill as is there set forth, instead of admitting such fact as he has done; or he should have shewn, in and by his plea, that the bill accepted by him was made payable more than twelve months after the date thereof, and had more than twelve months to run, or that it was made payable more than three months after date, and had more than three months to run, and that the present action was commenced before the passing of the last-mentioned statute, or that the bill was accepted before the passing of the above-mentioned statutes, or such other matters as the case may require. Also on the ground that the plea neither traverses and denies, nor confesses and avoids the matters contained in the declaration.

*R. V. Richards*, in support of the demurrer. This bill is exempted from the ordinary operation of the usury laws by 3 & 4 *Will.* 4, c. 98, s. 7, which applies to bills not having more than three months to run, and by 7 *Will.* 4, and 1 *Vict.* c. 80, which applies to bills not having more than twelve months to run. *Vallance v. Siddel* (a) is an authority upon the present point. In *Berrington v. Collis* (b),

(a) 6 A. & E. 932; S. C. 2 N. & P. 78. (b) 5 Bing. N. C. 332.

where a note was held to be not within the protection of the former statute, the real contract was upon the security of leasehold premises, and the note was a *collateral* security only, and added for the purpose of evading the usury laws.

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*Busby* contra. It appears from the pleadings that there was a debt due from the defendant to the plaintiff antecedently to the date of the bill. The bill therefore has been given to secure usurious interest in respect of that antecedent debt, and not in respect of the bill itself. The plea would have been good, at all events, before the recent statutes; *Roberts v. Trenayne* (a), and *Morse v. Wilson* (b). *Berrington v. Collis* (c) is in point, for it shews that the recent statutes do not protect a bill which is given to secure usurious interest on a transaction dehors the bill itself. In *Connop v. Meaks* (d), where the Court refused to set aside a warrant of attorney on the ground of usury, the warrant had been given to secure the amount of the bills themselves, on which usurious interest had been taken. The 3 & 4 Will. 4, c. 98, s. 7, says, that "no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest, in discounting, negotiating or transferring the same, be void;" and then proceeds to say, "nor shall the liability of any party to *any* bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury." It is clear that in the last recited passage the word "such" has been omitted after the word "any," and this is intimated in *Val-lance v. Siddel* (e); if the passage is to be applied without restriction to "any" bill, it is clear that there would have been no need of the subsequent act of 7 Will. 4 and

(a) Cro. Jac. 507.

(b) 4 T. R. 353.

(c) 5 Bing. N. C. 332.

(d) 2 A. & E. 326; S. C. as  
*Connop v. Ycates*, 4 N. & M. 302.

(e) 6 A. & E. 932; S. C. 2 N.  
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1 *Vict.* c. 80, exempting bills at twelve months from the usury laws. The same omission of the word "such" occurs in the latter statute also. If then the word "such" be supplied, the usury laws will be inoperative only where interest is taken in discounting, negotiating or transferring bills, but they will still reach a case like the present, where the interest has been previously taken on an account stated.

*Richards* in reply. Even if the word "such" be introduced, the bill in question is within the statute; it has been "negotiated" or "transferred" to secure the residue of the original debt. The statute must extend to bills given for pre-existing debts.

LORD DENMAN C. J.—It is impossible to take this case out of the protection of the statute. It has not more than twelve months to run, and that is all that is necessary.

PATTESON and WILLIAMS Js. concurred.

Judgment for the plaintiff.

*Friday,*  
*June 21st.*

SKUSE v. DAVIS.

1. A plea to an action for an assault stated that the defendant had been summoned before two justices for the same assault,

**TRESPASS** for cutting and wounding, and assaulting and beating the plaintiff. Venue; Surrey.

Pleas, as to the cutting and wounding, not guilty; and as to the residue of the said trespasses, the defendant says that the plaintiff ought not to maintain the action against who thereupon dismissed the complaint upon the hearing, and did then, according to 9 *Geo.* 4, c. 31, s. 27, make out a certificate of such dismissal:—Held, on special demurrer, that, as the grounds of the certificate did not appear, it could not be taken to have been given under such circumstances as to make it a bar to the action, and that the plea was bad.

2. Where in such a case the venue of the declaration was in Surrey, and the plea stated that the complaint was dismissed by justices of Surrey, it was held to appear sufficiently that the assault was committed in the same county, so as to give jurisdiction to such justices.

him, because he says that the residue of the said trespasses were committed after the passing and commencement of a certain act of parliament, made and passed in the 9th year of the reign of *Geo. 4*, c. 31, and that such residue of the said trespasses amounted to no more than a common assault and battery within the meaning of that act; and that after the commission of such last-mentioned trespasses, to wit, on the 9th June, 1838, upon complaint of the plaintiff then made by him of the last-mentioned trespasses, according to the said statute, the defendant was summoned and appeared before the *Rev. G. W. Onslow* and the *Rev. A. Onslow*, then being justices of the peace in and for the county of Surrey; and thereupon the said justices, so being such justices, did then dismiss the said complaint upon the hearing thereof; and thereupon they the said justices, so being such justices, did then, according to the said statute, forthwith make out a certificate under their hands stating the facts of such dismissal, and did then deliver such certificate to the defendant; whereby and by force of the said statute the defendant then became and still is released from this action so far as relates to the said trespasses in the introductory part of this plea mentioned. Verification.

Special demurrer to the second plea; for that it does not appear by the plea on what ground the said justices dismissed the complaint therein mentioned, whether because the said justices deemed the complaint not to be proved, or because they found the assault and battery to have been justified, or so trifling as not to merit any punishment; and for anything that appears by the same plea the said justices may have dismissed the said complaint because they deemed they had no jurisdiction in the matter; and also for that it does not appear in or by the same plea that the said justices had any jurisdiction to decide upon the said complaint, inasmuch as it appears that the said justices were justices of the peace in and for the county of Surrey, and it does not appear that the trespasses, in the introductory part of the same plea mentioned were

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committed in the county of Surrey; and also for that it does not appear by the same plea that the plaintiff ever complained of the trespasses in the introductory part of that plea mentioned to the said justices, or that the plaintiff caused the defendant to be summoned before the said justices, or that the defendant was summoned before the said justices, and also for that it is not positively and expressly stated that the said justices ever heard the said complaint of the plaintiff, or heard or examined the plaintiff or any witnesses on his behalf, but the same is only stated argumentatively and by way of inference, and no certain issue can be taken thereon, and also for that the tenor and effect of the said certificate ought to have been set out, whereby the Court might judge of the sufficiency thereof, and it ought to have been set forth what were the facts of such dismissal, which are alleged to have been stated in the said certificate. Joinder in demurrer.

*Byles*, in support of the demurrer. The 9 Geo. 4, c. 51, s. 27, gives power to two justices to convict summarily in cases of common assault; "but if the justices shall deem the assault or battery not to be proved, or shall find the assault or battery to be justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." By the 28th section any person who shall have obtained such certificate is released from all further proceedings for the same cause. By sect. 29 it is "provided that if the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion, from any other circumstances, that it is a fit subject for prosecution by indictment, they shall abstain from any adjudication thereupon;" and it is also provided that they shall not try any case of assault or battery in which any question shall

arise as to an interest in land, or as to any bankruptcy or insolvency, or execution. In the present case an attempt to commit felony, or other matter within the last mentioned section, may have been involved. The certificate therefore, or the tenor and effect of it, should have been stated, that the grounds on which it proceeded might appear.

Another ground of demurrer is, that the plea does not shew that the justices who gave the certificate had any jurisdiction to adjudicate upon the assault. It is said that justices of Surrey gave the certificate, but it is not said that the assault was committed in that county. Justices cannot regularly do any judicial act in respect of a matter happening out of their county; 2 *Hale*, P.C. 50, *Bac. Abr. Justices of the Peace* (E 5); although they may do a ministerial act under such circumstances, such as examining a party robbed; *Helier v. Hundred de Benhurst* (a). The statute now under consideration does not expressly give jurisdiction to any justices except those of the county in which the assault was committed; they must therefore be justices of the county. Where the legislature has desired to give justices a more extended jurisdiction, it has expressed itself suitably, as in 5 & 6 *Will. 4*, c. 19, s. 38, by which the jurisdiction under the 9 *Geo. 4* is, with respect to assaults on board merchant ships, given to “any two justices of the peace in any part of his majesty’s dominions.” The terms of their commission in themselves confine the jurisdiction of justices to such matters as happen within their own county; and it would be inconvenient if it were otherwise, for a party might be summoned before justices in Devonshire to answer for an assault committed in Cumberland. The circumstance that the venue in the declaration is Surrey cannot shew that the assault was there committed, for the venue in such case is transitory, and being therefore immaterial, is not admitted by the plea, *Bennion v. Davison* (b), and could not be traversed. The Court never intends jurisdiction in favour of inferior courts.

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(b) 3 M. &amp; W. 179.

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*M. Chambers*, *contra*. The act does not confine the jurisdiction over assaults to justices of the particular county. [Lord *Denman* C. J. We need not hear you on that point.]

As to the other point, the statute requires the justices to give a certificate "stating the fact of such dismissal." The word "such" does not imply that the certificate is to embody the grounds of dismissal. In notices of appeal it is sometimes necessary to give the grounds of appeal, but that is only where the statement is expressly required by statute. [Lord *Denman* C. J. Suppose the justices dismissed the complaint because the assault was committed in Sussex?] It must be taken that the certificate was legally given. The plea states that the justices "did then according to the statute forthwith make out a certificate." The certificate imports adjudication: it cannot therefore be taken that the certificate was given in a case of assault within the 29th section, for they would then have no power to adjudicate.

*Byles*, in reply. [Lord *Denman* C. J. It appears from the declaration that the assault was committed in Surrey, and the defendant says that justices of that county disposed of the assault in a summary way. The plea therefore makes the statement as to the assault having taken place in Surrey a material statement, so that it might have been traversed by the replication.] It appears from the venue only of the declaration that the assault was in Surrey; that could not have been traversed. [Lord *Denman* C. J. Why not?] It could not have been traversed alone, though it might, perhaps, in conjunction with other facts. [He then gave up this point.]

The grounds on which the complaint was dismissed should have been stated in the certificate, otherwise the parties themselves cannot tell whether it is a bar to any other proceeding.

LORD DENMAN C. J.—There are three cases only in

which the justices are to give a certificate under the act, and unless the grounds of the certificate are stated, the parties cannot know whether it is a bar or not.

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PATTESON J. (a).—I thought at first that the maxim “omnia ritè esse acta” might be called in to support the plea, but I think now that we must give some meaning to the word “such.” A certificate of such dismissal must mean a dismissal for such cause as the statute has antecedently provided shall warrant the dismissal. The cause should be stated. It is true that the justices are not empowered to give a certificate in other than the cases mentioned; but I do not know that it would be *unlawful* for them to give a certificate on the ground that the assault involved an attempt to commit felony. What would be the effect of such a certificate is another matter.

WILLIAMS J.—When we are asked to intend jurisdiction, we are asked to intend too much. When once jurisdiction is shewn in cases of orders, we may then intend many things. As we cannot intend jurisdiction, the grounds of the certificate should have been stated, so as to shew it is a bar to this action.

*M. Chambers* then applied for leave to amend.

LORD DENMAN C. J.—You should have applied before.

PATTESON J.—It would be a bad example to allow the amendment after the Court has been so long occupied with the argument. I think it should be an invariable rule never to allow an amendment after a full argument.

Judgment for the plaintiff.

(a) *Littledale J.* was absent.



1839.

Friday,  
June 21st,

HOLMES v. CLIFTON, Esq.

A right of action against the sheriff for a false return to a fieri facias is not waived by accepting the sum levied on account and in part satisfaction of the sum indorsed on the writ.


CASE against the Sheriff of Lancashire for falsely returning, to a writ of fieri facias, indorsed to levy 110*l.* debt and damages &c. on the goods and chattels of one *Mentze*: that he had caused to be made of the said goods and chattels 160*l.*; that he had retained 6*l.* 10*s.* for poundage and expenses; that he had 153*l.* 10*s.* ready &c.; and that *Mentze* had not any more goods and chattels &c.

Fourth plea. That defendant, as such sheriff, in pursuance of the writ, caused to be made of the goods and chattels of *Mentze* in the bailiwick of him the defendant, as such sheriff, the sum of 160*l.*, and then retained thereout the sum of 6*l.* 10*s.* for poundage and expenses, and then returned the said writ in the terms in the declaration mentioned, and then had the sum of 153*l.* 10*s.* residue of the said sum of 160*l.*, after deducting and reserving therefrom and thereout the said sum of 6*l.* 10*s.* for poundage and expenses, to render to the plaintiff as in the return is mentioned; that the plaintiff *accepted* 153*l.* 10*s.*, and the said sum was then paid to him *for and on account*, and in and towards payment and satisfaction of the said debt and damages in the said declaration, and in the same writ mentioned. And the plaintiff thereby *waived* and relinquished all cause and right of action against the defendant by reason of the premises.

Replication to the fourth plea: that the plaintiff took, accepted and received the sum of 153*l.* 10*s.* and the said sum was paid to the plaintiff, for and on account and towards payment and satisfaction of the said debt and damages in the declaration and writ mentioned, but not in payment or satisfaction of the said debt or damages in manner and form as the defendant hath above in his said last plea in that behalf alleged.

Demurrer to the replication, on the ground that it does not traverse or attempt to put in issue any material allegation, and seeks to raise an immaterial issue only; and also

that by the replication all the material parts of the plea, and so much thereof as is necessary to bar the plaintiff's action against the defendant, are admitted and confessed, without any avoidance thereof.

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Joinder in demurrer

*Knowles*, in support of the demurrer. The replication is bad; the plaintiff waived his right of action for a false return by accepting money under the return; *Benyon v. Garrat* (a). The principle is, that a party shall not be allowed to question the regularity of a proceeding under which he has consented to take a benefit. So in *Watson v. Wace* (b), where the plaintiff had formerly obtained his discharge, under 49 Geo. 3, c. 121, s. 14, on the ground that he had become a bankrupt, and that his detaining creditor had proved under the commission, it was held that the plaintiff could not afterwards dispute the validity of the commission in an action of trespass against the assignees.

*Bramwell*, contra, was not called upon by the Court.

LORD DENMAN C. J.—The case of *Benyon v. Garrat* (a) cannot be supported; it might as well be said, that if a man owes me 100*l.* and I take 10*l.* on account, I thereby waive the rest of the debt.

PATTESON (c) and WILLIAMS Js. concurred.

Judgment for the plaintiff.

(a) 1 C. & P. 154.

& R. 633.

(b) 5 B. & C. 153; S. C. 7 D.

(c) *Littledate* J. was absent.



1839.

Thursday,  
June 6th.

The costs of defending quo warranto informations against an alderman of a borough, and of prosecuting a criminal information against a person for insulting a justice, are not payable out of the borough fund.

The 7 W. 4 and 1 Vict. c. 78, s. 44, which grants a certiorari to remove any order for the payment of money out of the borough fund is retrospective.

The town council may apply for a certiorari to remove an order of a previous council.

The QUEEN v. The COUNCIL of BRIDGEWATER.

SIR W. W. FOLLETT had obtained a rule in Michaelmas term, 1837, calling upon the town council of Bridgewater to shew cause why a certiorari should not issue to remove into this Court certain orders made by them on the 23d January, 1837, for defending at the expense of the council three several rules for a quo warranto against three members of the town council, and for payment by the treasurer *Benjamin Lovibond* of 100*l.* on account of the costs of defending the same; and also certain other orders then made for defending at the expense of the said council a rule nisi for a criminal information against one *Chapman* for insulting a borough justice, and for payment of 90*l.* to the said *B. Lovibond* on account of the costs of defending the same. This rule was obtained on the affidavit of *Matthew Passmore*, an attorney, and a burgess of the borough of Bridgewater. The affidavits in answer stated that this application was in fact made by Mr. *Passmore* professionally, on behalf of the town council of Bridgewater, who had passed a resolution on the 20th November, 1837, to apply for a certiorari to remove the above orders, and that they had also resolved not to oppose the rule.

*Erle* shewed cause in Hilary term (a), and admitted that the orders were not a valid appropriation of the borough fund, but contended that the order being made in January 1837, the certiorari was taken away by 5 & 6 Will. 4, c. 76, s. 132, for that 7 Will. 4 & 1 Vict. c. 78 (b), which passed

(a) Before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(b) After reciting that it is expedient to give all persons interested in the borough fund of every borough a more direct and easy remedy for any misapplication of the fund, sect. 44 enacts,

“ that any order of the council of any borough for the payment of any sum of money from or out of the borough fund of any borough, may be removed into the Court of King's Bench by writ of certiorari, to be moved for according to the usual practice of the said Court with respect to writs of certiorari.”

July 7, 1837, was not retrospective. 2. On the affidavits on which this rule has been obtained, there is no proper applicant even if sect. 44 is retrospective, for it appears that this application is made on behalf of the town council, whereas the power of applying for a certiorari is given for the purpose of reviewing the acts of the town council. 3. The treasurer cannot be called on in this case, because he received the order in January, 1837, and paid the 100*l.* to Mr. *Lovibond* *bonâ fide*, and therefore the payment was protected by sect. 1 of 7 *Will.* 4 & 1 *Vict.* c. 78.

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Sir *W. W. Follett*, *contra*. . If the 7 *Will.* 4 and 1 *Vict.* c. 78, s. 44, does not apply to an order like the present it is a great omission, but it clearly does apply. The words of the act are general that *any* order may be removed, and it is a remedial act. It is not like the case of an act altering the rights of parties, and which therefore is usually held to be prospective only. Here it only facilitates the remedy. If the order were a bad one, before the passing of the act, there was a remedy in the Court of Chancery. 2. It is said that this is an application by the town council, but the affidavit on which the rule was obtained shews that it is the application of a rated burgess. Besides if the town council decide that the matter should be brought before the Court, why should not they interfere in it? They are trustees for the burgesses at large. 3. The application is not made against the treasurer personally, but to remove the order. [Lord *Denman* C. J. If we grant the certiorari, what step would you take then?] It is impossible to say, but an attempt would be made to take proceedings against the parties by whom the order was made.

LORD DENMAN C. J.—We have no hesitation in saying this was a clear misapplication of the borough fund, as there was no public purpose to which the money was to be appropriated. We also think that the town council had full power to apply for the writ of certiorari, but we wish to

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pause before we determine whether the writ should be granted.

*Cur. adv. vult.*

Lord DENMAN C. J. on this day delivered the judgment of the Court as follows:—This was a rule for a certiorari to remove an order for payment of costs of a *que warranto* and rule for criminal information against some person for affronting a magistrate, and we think it must be made absolute, there being clearly no public purposes which called for such an appropriation of the borough fund. But an objection was taken in this case, that the treasurer had rendered all his accounts before the 7 *Will. 4 & 1 Vict.* c. 78 (July, 1837), which gives power to remove accounts, the certiorari having been taken away by 5 & 6 *Will. 4*, c. 76. But the latter act, reciting that it is expedient to give all persons interested in the borough fund of every borough a direct and easy remedy for any misapplication of such fund, enacts that any order of the council of any borough for the payment of any sum of money from or out of the borough fund of any borough may be removed into the *Banco Regis* by certiorari, not confining it to orders thereafter to be made, nor to such accounts as were unsettled at the time of the passing of the act.

Rule absolute.

Thursday,  
June 13th.

CANN v. CLIPPERTON.

Where the  
plaintiff under  
a claim of  
right had taken

**TRESPASS** and false imprisonment. Plea, not guilty.  
At the trial before Lord *Denman* C. J. at the sittings after

forcible possession of premises and committed several outrageous acts, the attorney of the owner of the premises having been sent for *on the following day* gave the plaintiff, whom he found still on the premises, in charge, under the Malicious Trespass Act, 7 & 8 *Geo. 4*, c. 30; held, that although not justified in so doing, he was entitled to notice of action.

To entitle a defendant to notice of action, under the Malicious Trespass Act, he must have acted both with *bona fides*, and also have had probable cause for believing that he was acting under the statute.

term, 1838, it appeared that the defendant was the owner of a person named *Wilman*, who was the owner of a house in Sun-street, Bishopsgate, of which *Worrall*, a brother-in-law of the plaintiff, was tenant, and which *Worrall* had underlet to a person of the name of *Horswell*. Disputes had taken place between *Wilman* and *Worrall*, and an action had been brought by the former to recover possession of the premises, which had been abandoned and vacant by *Worrall* and *Horswell*. On the 21st November 1837, *Wilman* having sent in some labourers to repair the premises, the plaintiff, accompanied by Mrs. *Horswell* and a number of men, forcibly took possession of the premises, took out the windows, and committed a number of riotous acts, and in the course of the night burnt some coals on the hearth which set the premises on fire, and did considerable damage. On the following morning a policeman having observed the state in which the premises were, sent a message to *Wilman*, whereupon the defendant came and finding the plaintiff on the premises, gave him notice to leave. The plaintiff was taken before the lord mayor, and was charged by the defendant with a malicious trespass on the premises, but, on the plaintiff stating that actions were pending between his brother-in-law *Worrall* and *Wilman* respecting the premises, his lordship dismissed the charge. On these facts the counsel for the defendant submitted, on the authority of *Beechey v. Sides* (a) and *Ballinger v. Ferris*, that, as the defendant was acting bonâ fide under the malicious trespass act, 7 & 8 Geo. 4, c. 30, s. 41, he was entitled to notice of action, and therefore that the plaintiff should be nonsuited. His lordship, however, thought that section 28 of the act only enabled such parties to be apprehended as were “found committing any offence against the act,” and the defendant was not entitled to the protection of the act, and he left it to the jury to say, first, whether the defendant believed bonâ fide that he was carrying the act


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v.

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(a) B. &amp; C. 806; S. C. 4 Mann.

(b) 1 M. &amp; W. 628.

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into execution; secondly, whether he was acting as agent for *Wilman*; thirdly, whether the plaintiff was found committing the trespass. The jury found the two first points in the affirmative, and the last in the negative; and the verdict passed for the plaintiff with 1s. damages, whereupon his lordship gave the defendant leave to move to enter a nonsuit.

*Kelly* having obtained a rule accordingly, in the ensuing Easter term,

*Platt* and *Fish* now shewed cause. It is contended that, because the defendant acted with *bona fides* in giving the plaintiff into custody, he is therefore entitled to notice under the 7 & 8 Geo. 4, c. 30. But how can mere *bona fides* have this effect? Suppose any stranger had been walking by the premises after a trespass had been committed, can it be contended that he would have been justified in apprehending the plaintiff. But the defendant, not having been present when any thing was done, was a mere stranger. It might as well be contended that a person who chose to clear a street of all passers by, could claim the protection of the act, on the ground that he did it *bonâ fide*. The words of the 7 & 8 Geo. 4, c. 30, s. 28, are express, "that any person found committing any offence against this act" may be apprehended, and therefore are not so extensive as the repealed act 1 Geo. 4, c. 56, s. 3, which enabled persons to be apprehended "who shall have actually committed, or be in the act of committing any offence, &c." *Cook v. Leonard* (a) is a direct authority that besides *bona fides* there must be probable reason for believing that the party is acting under the act, and *Wedge v. Berkley* (b) decides the same point. It is clear here that, if the defendant knew any thing about the act, he would not imagine himself to be

(a) 6 B. & C. 351; S. C. 9 D.  
 & R. 339.

(b) 6 A. & E. 663; S. C. 1 N. &  
 P. 665.

acting under it. *Beechey v. Sides* (a) is distinguishable, for *Bayley J.* rested his judgment on the ground of there being "fair colour for supposing he (the defendant) is warranted by the act of parliament." So also in *Ballinger v. Ferris* (b), where the officer was held entitled to notice, a clear trespass had been committed, and Lord *Abinger C. B.* said it was clear "that the officer must have been close by when the act was done," the decision proceeded on the necessity of extending protection to public officers.

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*Kelly and Crowder, contra.* The distinction pointed out between the 7 & 8 *Geo. 4*, c. 30, s. 28, and 1 *Geo. 4*, c. 56, shews how completely the defendant has entitled himself to the protection of the act. Because, at the moment of giving the plaintiff in charge, he does not recollect that the words "who shall have actually committed an offence" are not contained in the present act, it is contended that he had no probable cause for supposing himself to be acting under it. There can be no question that, if the defendant had been present, and had given the plaintiff into custody on the preceding day, when the trespasses were committed, he would have been justified in so doing; if therefore he did so on the following day, though perhaps not quite justified under the act, it is just one of those cases in which he ought to have had notice of action, in order to be enabled to tender amends. The moderate damages assessed by the jury fully shew that there was no improper conduct on the part of the defendant. In *Cook v. Leonard* (c), *Bayley J.* clearly thought that the defendant had not acted *bonâ fide*, as *Gaselee J.* pointed out in *Wright v. Wales* (d). That case and *Ballinger v. Ferris* (b) are almost identical with the present. The language of Lord *Tenterden C. J.* in *Beechey v. Sides* (e) is express, "it

(a) 9 B. & C. 806; S. C. 4 M. & R. 339.  
 & R. 634.

(d) 5 Bing. 336.

(b) 1 M. & W. 628.

(e) 9 B. & C. 806; S. C. 4 Man.

(c) 6 B. & C. 351; S. C. 9 D. & R. 634.

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has uniformly been held that, where a party *bonâ fide* believes or supposes he is acting in pursuance of an act of parliament, he is within the protection of such a clause."

LORD DENMAN C. J.—This case is left a little bare on the facts, but on the whole I think the defendant was entitled to notice of action. (His lordship then stated the facts.) It is clear to my mind that the defendant not only thought himself justified by law, in giving the plaintiff into custody, but that he had probable cause for so thinking. I am unwilling to go the length of saying, that wherever a party thinks himself *bonâ fide* acting under an act of parliament, he is thereby entitled to the protection of the statute, and I think therefore what fell from Lord Tenterden in *Beechey v. Sides* (a) must be qualified by the observations of Bayley J. in the same case, viz. that the facts should be such as to furnish fair ground for supposing that the party is acting under the statute. I think they were so in the present case.


LITTLEDALE J.—Mere *bona fides* does not per se give any title to notice under an act; for a party may be very weak, and may consider himself to be justified under circumstances wherein no reasonable person would concur with him. In this case there was perhaps sufficient to induce the defendant to suppose he was justified under the act.

PATTESON J. — Perhaps, after all, these cases do not differ so much in principle as in language. It cannot be for a moment supposed that, because a party *thinks* himself justified under some act of parliament, he is thereby entitled to protection. Here, by my lord's notes, enough, I think, appears to shew that the defendant had good reason to believe he was acting under the 7 & 8 Geo. 4, c. 30.

WILLIAMS J. The clause as to notice in the act of par-

(a) 9 B. & C. 806; S. C. 4 Man. & R. 634.

liament is of no use unless it includes cases like the present, when a technicality in the provisions has been overlooked. The difficulty in all these cases is to draw the line between a perfect justification under the act and a foolish imagination that it is at all applicable. It is clear that there are intermediate cases between the two, and I think that this is one of them.

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Rule absolute.

  
 SHEARM v. BURNARD.

**ASSUMPSIT** on a promissory note for 100*l.*, made the 14th June, 1834, by defendant to one *Jose*, and by him indorsed to the plaintiff.

Plea, that the defendant, before the making of the said promissory note, to wit, on the 10th of April, 1834, at the request and for the accommodation of the said *Jose*, made and delivered to the said *Jose* a certain promissory note, whereby the defendant promised to pay to the order of *Jose* the sum of 100*l.* two months after the date thereof, which said last-mentioned note *Jose* then indorsed and delivered to the plaintiff; that there never was any consideration for the making of the said last-mentioned note. And the defendant further saith, that said last-mentioned note afterwards and before the making of the said note in the declaration mentioned, to wit, on the 13th of June, in the year aforesaid, became due, but was not paid, and, that the said note remaining unpaid, the defendant afterwards, to wit, on the day and year in the declaration mentioned, made the said note there mentioned, and delivered the same to *Jose*, in order to enable him to take up the said note in this plea secondly above-mentioned, and that the defendant never

*Friday,*  
*June 14th.*

To an action by indorsee against the maker of a promissory note, he pleaded that before the making of the note in the declaration mentioned, he made another note for the accommodation of the indorser, who indorsed it to the plaintiff, that when it became due, he (defendant) made the note in the declaration mentioned, and gave it to the indorser to take up such prior note. He then averred payment, by the indorser to the plaintiff, of the

note in the declaration mentioned, and acceptance by the plaintiff. Held, that the only material part of the plea was payment of the note declared upon, and that such payment might be proved without producing the note; and that all the averments as to the prior note were surplusage, which the defendant was not bound to give any evidence of.

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received any other consideration or value for the making of the said note in the declaration mentioned. And the defendant further saith, that afterwards and after the said note in the declaration mentioned became due, and before the commencement of this suit, to wit, on the 17th of August, 1834, and on divers other days and times between that day and the commencement of this suit, *Jose* paid to the plaintiff divers monies, to wit, to the amount of 110*l.* in full satisfaction and discharge of the said promissory note in the declaration mentioned, and of all damages by the plaintiff sustained by reason of the non-payment thereof, and the plaintiff then accepted and received such payments from *Jose* in full satisfaction and discharge of the said promissory note in the declaration mentioned, and of the damages aforesaid. Verification.

Replication de injuriâ.

On the trial, before *Bosanquet J.*, at the Cornwall spring assizes, 1837, the defendant proved payment by *Jose* of a note corresponding in all particulars with the note in the declaration. The note was not given up to *Jose* on payment. The note was not produced by the plaintiff, and it was objected on his behalf that no evidence respecting it could be given by the defendant, as he had not given notice to produce it, and *Reed v. Gamble* was cited (a). No evidence whatever was given respecting the prior note of the 10th of April. The learned judge was of opinion that the defendant should have proved not only payment of the second note, but also that the second note was given in satisfaction of the first.

Verdict for the plaintiff.


*Erle*, in the following Easter term, having obtained a rule nisi for a new trial, on the ground of misdirection,

*Bompas Serjt.* and *Butt* now shewed cause, and cited *Reed v. Gamble* (a) to shew that the defendant should

(a) 5 N. & M. 433.

have given notice to produce the note declared on. [*Paterson J.* I do not see how that case is an authority for the plaintiff. That was an action of assumpsit against the drawer of a banker's cheque, who pleaded that it was given for a gambling transaction. The plaintiff had a verdict, and a rule for a nonsuit was applied for on the ground that the plaintiff should have produced the cheque, which was called for by the defendant at the trial. The rule was refused, because "the non-production of the cheque did not prevent the defendant from going into his defence." The production of the note would have proved nothing. The question was on what account the money was paid, and that would turn on what took place between the parties at the time of payment.] At all events it should have been shewn that the note paid was given to satisfy the prior note. An allegation to that effect is made in the plea, and the whole is put in issue by the replication. If the defendant had obtained a verdict, it would be conclusive, as an answer to an action on the former note, that the second note was given for it. He should, therefore, have proved the allegation. [*Cole-ridge J.* The test as to the conclusiveness of the verdict, with respect to the first note, is, whether the defendant need have proved any of the allegations respecting it in this case. As the action is on the second note, that allegation is immaterial.] Before the defendant comes to that part of his plea which sets up payment as an answer to the second note, he has pleaded that which is an answer to the first note. As the plea extinguishes altogether all the plaintiff's rights on both notes, it should have been supported by commensurate evidence. In many cases where title is alleged unnecessarily, it must be proved as alleged (a).

*Erle* contrà. *Reed v. Gamble* (b) is obviously in favour of the defendant as to the production of the second note being

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(a) See 1 Wms. Saund. 346 a, n. (2). (b) 5 N. & M. 433.

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unnecessary. With regard to the first note, the statement of it is mere surplusage, and might have been struck out on motion. [*Patteson* J. If another action were brought on that note, would a plea of judgment recovered be demurrable?] It would: the Court would take judicial notice that it was unnecessary in this action to prove any thing relating to it. The whole preliminary statement is as immaterial as if it had been a statement that *Jose* had married a relation of the defendant. If the preliminary statement be struck out, there remains a good plea of payment, which was proved at the trial. [*Coleridge* J. In *Williamson v. Allison* (a), which was an action of tort for a breach of warranty of goods, the scienter was alleged, but it was held unnecessary to prove it. *Patteson* J. *Tanner v. Beun* (b) too is a similar case, where in assumpsit by indorsee against indorser, there was an unnecessary averment that the bill had been accepted.]

LORD DENMAN C. J.—The practice of introducing unnecessary facts on the record is not to be encouraged, but, as the preliminary averment in this plea was altogether immaterial, it was not necessary to prove it; and, if a verdict had been found in favour of the defendant, it would be taken by the Court that it had not been proved. A party does not, by statement of a fact, make that material which is immaterial in toto, though he may be held to circumstantial proof of a material averment, when made with unnecessary particularity. In this case all that was material was that *Jose* paid the second bill to exonerate the defendant, and that the plaintiff accepted the payment.

LITLEDALE J.—If the whole averment as to the first bill be struck out, the plea would still afford an answer to the action. The remainder alone was material and was proved. It was certainly unnecessary to give any notice to produce.

(a) 2 East, 446.

(b) 4 B. &amp; C. 312; S. C. 6 D. &amp; R. 338.

RTESON J.—It is clear that the first part of the plea  
ot proved; for, without production of the first note,  
ld not be known whether it had any existence, but the  
l note was admitted on the record. The first part of  
ea might have been struck out. I put this test, whe-  
n a subsequent action on the first bill, a plea of judg-  
ecovered in this action would be demurrable. Mr.  
ays that it would be so, and I think he is right, for de  
puts in issue what is material only, and we should  
ture action take notice solely of what had been mate-  
this record so as to have required evidence in sup-  
f it.

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LERIDGE J.—There is a distinction between cases in  
an entire averment can be got rid of as unnecessary,  
ases where an averment is necessary in the main, but  
e with unnecessary particularity, which fixes the party  
ading and obliges him to prove it. The distinction  
n in *Bristow v. Wright* (a).

Rule absolute.

(a) 2 Doug. 665.

FRANCIS T. BAKER.

Friday,  
June 21st.

EBITATUS assumpsit for 150*l.*, paid by the plain-  
the use of the defendant, at his request. Pleas;  
assumpsit; 2, as to 100*l.*, parcel &c., that the sum  
0*l.* was money paid, for the purchase of five *Stephen-*  
railway Company shares, by the plaintiff as the de-  
t's agent; that the plaintiff, after the payment of the  
y, that, after the payment, the plaintiff received certificates of title to the  
and ought to have delivered over the same to the defendant, but that, instead  
the plaintiff converted the certificates to his own use, and prevented the defendant  
posing of the shares, which were consequently of no use to the defendant, is bad  
al demurrer, as it admits the plaintiff's right of action to be completed, and  
by way of confession and avoidance, that which is only a ground of cross

To indebitatus  
assumpsit for  
money paid, a  
plea, that the  
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ant's agent,  
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said money for the shares, had thereupon delivered to him as the agent of the defendant, and received, as such agent, five certificates of title of the said shares for the defendant, and ought, as such agent, to have delivered the same to the defendant, in order that he might have sold and disposed of the shares for his own use and benefit, and derived great profits from such sale and disposal; but that the plaintiff wholly neglected and refused so to do, and after the payment of the 100*l.* for the shares, and before the commencement of this suit, the plaintiff, so being such agent as aforesaid, without the leave or license of the defendant, wrongfully, and in breach of his duty as such agent, converted and disposed of the five certificates of title of the shares for his own use and benefit, whereby the shares and the certificates thereof, for which the 100*l.* was so paid, became and were wholly lost to the said defendant. Verification.

Special demurrer on the following amongst other grounds: that the plea amounted to the general issue, or, if not, that it must be taken to admit that the 100*l.* at one time constituted a debt, payable by the defendant to the plaintiff upon request, and that a subsequent breach of the plaintiff's duty, in a separate transaction, could not operate as a satisfaction, but only render the plaintiff liable to an action for such breach of duty; and that the plea did not sufficiently shew whether it was a plea in denial of the debt having ever been payable on request, or in confession and avoidance, &c.

*Channell* appeared in support of the demurrer, but the Court called on

*Wightman*, *contrà*. The plea answers the declaration by shewing that no benefit was received by the defendant from the payment made by the plaintiff. [*Patteson* J. If the defendant admits that the money was paid by the plaintiff in the manner stated in the declaration, a cross action should have been brought.] This is a plea in con-

n and avoidance, and shews that subsequently to the  
 ise the defendant was deprived of all the benefit which  
 d a right to from the payment. Work may be done  
 plaintiff at the request of a defendant, but so badly  
 as to give no right of action. *Cole v. Le Souef* (a) is  
 like the present case. There an action was brought  
 cover money paid for the defendants: they pleaded  
 the money was paid by the plaintiffs as insurance  
 rs in effecting policies on the goods of the defendants;  
 he policies were so worded as to be invalid and use-  
 o the defendants. On special demurrer, the Court  
 nclined to think the plea good, and the plaintiffs had  
 to reply de novo. This plea therefore discloses a  
 defence, and does not amount to the general issue.

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annell, in support of the demurrer. The object of
 plea was to draw the plaintiff into a replication of de
 â, and then to demur, on the authority of *Parker v.*
 (b), or to confine him to the traverse of a single fact.
 e plea denies the contract, it is bad, as amounting to
 general issue, and concluding with a verification. If
 plea is not in denial, what does it confess? If it does
 confess every thing alleged in the declaration, it is a
 plea; if it does so confess, then the answer which is
 p to the plaintiff's claim should have been made the
 ct of a cross action, for it confesses that the shares
 re property of the defendant, and avers that they are
 gfully withheld from him. The cases on the point
 ollected in *Kennedy* on the New Rules, p. 106.

ightman. The worthlessness of the work done, in
 ct of which the action is brought, can only be shewn
 r the general issue, if the work was always worthless.

the plea admits that the plaintiff's payment was
 ally of some value, and shews that its value was

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destroyed by his subsequent conduct. The general issue would have put in issue the payment on request and the implied promise, so that if the defendant had so pleaded, he would have been beaten, for he admits all these matters. [*Patteson* J. Trover would certainly lie for the shares, under the circumstances disclosed by the plea, so that if they can be set up as a defence to this action, it can only be to avoid circuitry.] It appears from *Fisher v. Samuda* (a), that where an action has been brought for the value of goods furnished at a stipulated price, the purchaser should set up the bad quality of the goods in bar of that action or in reduction of damages, and that he cannot afterwards maintain a cross action on the ground of the goods being of bad quality.

LORD DENMAN C. J.—I am of opinion that this demurrer must prevail. If the plea denies the contract, it amounts to the general issue, and, if it is put as a plea in confession and avoidance, it discloses that which is matter for a cross action only, and not for avoidance of the present action. It sets up that the plaintiff diverted the article, which he had purchased at the defendant's request, from its proper destination, so that the defendant was deprived of benefit from the purchase. One reason why a cross action should be brought in such a case may be that the damages arising to the defendant from such conduct in the plaintiff, may have been greater or less than the price of the purchased article.

PATTESON J. (b).—I am not aware that such a plea as the present has ever been allowed. In *Cole v. Le Souef* (c) the payment was made in such a manner that it never was of any value to the defendant; and I have great difficulty in saying that the plea in that case did not amount to the general issue. Here there was a moment of time, before

(a) 1 Campb. 190.

(c) 5 Dowl. P. C. 41.

(b) *Littledale* J. was absent.

the conversion, when the plaintiff's payment was of some value: the action vested at that moment; and the tortious act afterwards by the plaintiff is set up as an answer to the action.

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WILLIAMS J.—The distinction between this case and the cases, in which the worthlessness of the work done by the plaintiff has been admitted in answer to his claim, is that in them the defence arose out of the imperfect manner in which the contract itself was executed by him. Here the execution of his contract was completed by the plaintiff; and it is by matter *dehors* its execution, by a tortious act subsequently done, that the defendant was deprived of due benefit.

Judgment for the plaintiff.

STURGE v. BUCHANAN.

Saturday,
June 22nd.

INDEBITATUS assumpsit for goods bargained and sold, goods sold and delivered, money lent, money paid, money had and received, for interest, and on an account stated.

Plea, (before the new rules,) non assumpsit.

At the trial before Lord *Denman* C. J., at the sittings in London after Hilary term, 1838, the following facts appeared. The plaintiff, who was a shipowner in London,

1. The plaintiff had given notice to the defendant to produce certain letters written by the defendant to the defendant's partner in New South Wales, and had called upon him to

admit an extract from a letter book kept by the defendant, (describing it). A judge made an order on the defendant to make the admissions contained in the notice, and the defendant consented to produce the letter book at the trial:—Held, that the letters contained in the letter book were secondary evidence of those described in the notice, although no other proof was given that the letters had been actually sent. Held also, that the defendant was not entitled to read other letters contained in the letter book.

2. The notice to produce was served four days before the trial. This action was commenced in 1832, and proceedings had taken place in Chancery also in respect of the subject-matter of the letters:—Held, that they must be presumed to have been sent back from New South Wales, and that the notice was therefore sufficient to let in secondary evidence.

3. The fact of copies of letters being kept in a merchant's letter book, is evidence against the party of the letters having been sent.

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had sent out, in 1828, a vessel called the "Nelson," of which one *David* was master, on a whaling voyage to the South Seas. In the early part of 1831 the Nelson put into Sydney to repair, having a cargo on board of 139 tuns of oil and head matter. The master, instead of ordering such repairs to be done as would enable the Nelson to prosecute her homeward voyage, ordered a thorough repair, transhipped the cargo to a vessel called the "Lady Harewood," which was consigned to Messrs. *Lamb* and *Buchanan*, at Sydney, for a cargo, and, on making the consignment to defendant in London of the bill of lading of the plaintiff's oils, started upon a fresh whaling voyage. Messrs. *Lamb* and *Buchanan*, to enable the master to complete these arrangements, advanced to him upwards of 5000*l*. The defendant was a partner (residing in London) in the firm of *Lamb* and *Buchanan* at Sydney. The action was brought to recover the price of the cargo of oil consigned by the master to the defendant, and the latter claimed to set off the advances made by *Lamb* and *Buchanan* at Sydney. The question at the trial was, whether the plaintiff had given any ratification in London of the course pursued by *David* at Sydney. Proceedings in Chancery had been taken by the plaintiff in order to restrain the defendant from selling the cargo received by the Lady Harewood, and the present action was commenced in 1832. At the trial the plaintiff proposed to read certain letters written by the defendant to *Lamb* and *Buchanan* at Sydney, and which had appeared in the defendant's letter book, annexed by him to his answer in Chancery at the suit of the present plaintiff. It was objected by the defendant that the letters must be proved. The plaintiff thereupon proved a notice to produce the letters in question, and which had been served upon the defendant four days before the trial. He also proved a judge's order (in the usual form) to make the admissions specified in the notice, in which, under the head "Duplicates, copies or extracts," was the following—"Extract from a letter book kept by the defendant, No. 304, date 1st

September, 1831." The other letters were specified in the same manner. It appeared also that the defendant had given an undertaking to produce the letter book. It was contended for the defendant that, if the letter book was called for as a book made out by the defendant, the whole book was put in evidence, and might be read; but that, if that were not so, as there was no proof of the letters in question having been sent to New South Wales, and as the notice to produce had been served only four days before the trial, secondary evidence of the letters was inadmissible. His lordship ruled that under the circumstances the notice was sufficient to let in secondary evidence, and that the defendant was not entitled to have the whole of the letter book read. The verdict passed for the plaintiff, damages 666*l.* 3*s.* 6*d.*, subject to certain deductions to be made out of court.

Sir *W. W. Follett* obtained a rule nisi for a new trial in the ensuing Easter term, on the ground of evidence having been improperly received, and also on the verdict being against evidence.

Sir *J. Campbell A. G.*, Sir *F. Pollock*, *R. V. Richards*, and *Swann*, shewed cause on a former day in this term (*a*). The question is whether, where a merchant's letter book is produced for the purpose of reading certain letters which have been written, the other side is entitled to have all the other letters in the book, relating to the subject in dispute, read. The letter book was clearly primary evidence, or secondary evidence, or both. It was primary evidence, like any other book kept by the defendant, and for this purpose is not to be distinguished from any other book in the defendant's handwriting, or kept by his order. It shewed moreover that a letter had been sent by the defendant, and it is admitted that, if that letter had referred to any others in the book, those also would have been admissible. But it

(*a*) June 15th, before Lord *Denman C. J.*, *Littledale*, *Patteson*, and *Williams Js.*

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is contended that the letter book forms one document. But how can the binding letters up into one volume make the case different from that of letters produced on a file, where it is clear the reading of one would not entitle the others to be read? *Prince v. Samo* (a) shews clearly that the accidental connection of the letters with those put in evidence does not enable them to be read; and *Catt v. Howard* (b) is a distinct authority that the reading certain entries from the defendant's day book does not entitle the defendant to read other entries in the same book.

With regard to the time when the notice to produce was served, it clearly appears from *Phillipps* on Ev. 666, ed. 1838, that its reasonableness depends on the presumption of the document being in the possession of the party; which cannot be doubted in the present case, from the length of time the litigation had been going on, and from the certainty that all necessary documents would have been sent from Sydney.

Kelly and *Wightman*, contra. When the defendant consented to admit the letter book, he did not admit that the letters it contained were copies of letters actually sent. The plaintiff therefore, to make it admissible as secondary evidence, should have shewn that the letters had been actually sent. But, as these letters had been sent to New South Wales, a notice to produce them three or four days before the trial was clearly insufficient. It is true that, where the document in question forms the substantial subject of the suit, so that it must be presumed to be in the possession of the defendant, the rule as to notice is relaxed, as in the case of trover for a bond (c), and the like. But these letters were not at all essential to the action, and it cannot be expected that they would have been sent back to the defendant from New South Wales. It is not denied that the

(a) 7 A. & E. 627; S. C. 3 N. & P. 139.

(b) 3 Stark. N. P. C. 3.

(c) See *How v. Hall*, 14 East, 274; *Shearm v. Burnard*, ante, 565.

letter book is evidence to a certain extent, as a document kept by the defendant, containing statements relating to the subject-matter of the suit; but on this ground all the statements in the book should have been read; and the case comes quite within the distinction laid down in *Prince v. Samo* (a). The book may be looked upon as if it were entitled "An account of the transactions relating to the ship Nelson;" and surely it is very unfair to admit part of the account only. With regard to *Catt v. Howard* (b), the case was not much considered, and the objection being made by the successful party, the decision could not be reviewed.

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LORD DENMAN C. J. now delivered the judgment of the Court.

As to the evidence. Plaintiff had had the advantage of seeing some letters, written and sent by defendant to his partner, exclusively I presume by means of a suit in Chancery. He gives him notice to produce three of them, which he particularly describes: he then summons him before a judge to admit copies of those three letters: the judge orders accordingly by consent, and subject to all just exceptions, and the copies are signed by the judge and the attornies; the defendant at the same time agrees to produce his letter book at the trial. The notice is proved; the signed copies produced, which are objected to because the defendant had agreed to produce the book. The book is then called for and produced: plaintiff proposes to read the three letters. This proceeding gives rise to several objections.

First, That the notice is insufficient, the letters having been sent to the partners in New South Wales; that therefore no secondary evidence was receivable.

The sufficiency of the notice in all cases depends on cir-

(a) 7 A. & E. 627; S. C. 3 N. & P. 139. (b) 3 Stark. N. P. C. 3.

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cumstances. If the letters *are in New South Wales*, this notice is nothing. But there is no proof of this, nor any presumption. This action was brought in 1832: proceedings had since been commenced in Chancery, and were greatly prolonged. All documents were probably sent over and produced, and would remain in England, where they are likely to be wanted. The notice, then, was good; secondary evidence was admissible, and the plaintiff was free to call for the letter book as a means of proving the contents of those particular letters. Second, Even if he was not, defendant had expressly undertaken to produce that letter book for proof of those letters. He does so, but contends that they are not to be read without proof that they were actually sent. The answer is, first, that the description of them as *sent* is perfectly immaterial; the writing of them by defendant being the only fact required to make them evidence. Second. The letter book, when produced in pursuance of the undertaking, clearly shews that they were sent. The very fact of their being transcribed into such a book proves this as against the party keeping it. Defendant now says, "As you prove the letters by my book, I have a right to read in evidence the whole of that book, or at least the whole correspondence on the subject, as it is found in the same book. You produce a document of my writing, and must read the whole." But how can this be called a document? It is a series of copies of letters written from time to time; on principle exactly the same thing as if they had been kept in his counting house on a file. It is like proving what a party said in one conversation: one of these letters, or one of these conversations, may be proved without authorizing the opposite party to bring forward, for his own benefit, what he himself said or wrote in another conversation or a different letter. The late decision in *Prince v. Samo* (a) carries this principle much further. That the rest of the correspondence may throw light upon these parts of it is true, but the light may be a false one: plaintiff

(a) 7 A. & E. 627; S. C. 3 N. & P. 139.

is not bound to know whether it would or not, nor whether any other statements were made as they appear in the book, or if made were true.

It was surmised that an unfair advantage had been taken of defendant in obtaining a knowledge of these letters through a suit in Chancery, and then producing them without the answer, which may have greatly qualified and altered their effect. But I cannot think that a judge at *nisi prius* has any thing to do with these considerations. He is to inquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved. Or (taking this to be a piece of original evidence, as written by defendant or by his authority) he is to prove the handwriting or the authorization. He does this by the undertaking to produce the book in proof of the three letters described, and of the three letters only. The mode of proving them can give the other side no new rights.

Rule discharged.

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Saturday,
June 22d.

ASSUMPSIT on a bill of exchange drawn by the defendant on the 27th September, 1834, accepted by Lord *Arthur Chichester*, for 300*l.* at twelve months after date, and indorsed by the defendant to one *John Hunter*, and by *Hunter* to the plaintiff. Pleas, 1. That *Hunter* did not indorse the bill; 2. That the indorsement by the defendant was in blank, and that the defendant never delivered the bill to *Hunter*, but that he delivered the same to one *Lewis Levy*, and *Lewis Levy* then received, and from thence until

A plea to a count by an indorsee against the drawer of a bill of exchange averred that the bill had been drawn and indorsed to *L.*, for a specific purpose, who in fraud of that purpose had

handed it to *H.*, and that *H.* handed it to the plaintiff, not for good and valuable consideration, and that the plaintiff was not a *boná fide* holder:—Held, that this last allegation connected with the rest of the plea, meant only that the plaintiff had not given good consideration for the bill, and that fraud in the plaintiff could not be given in evidence under it.

Semble, that if the allegation had stood alone, it would not have raised an issue as to fraud.

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Hunter, as aftermentioned, first became possessed thereof, held the same for a specific purpose, for the sole use and benefit of the defendant, and not otherwise, to wit, for the purpose and in order that *Lewis Levy* might get the bill discounted for the defendant, and that he would deliver and pay the proceeds thereof upon such discounting to the defendant, that *Lewis Levy* fraudulently and covinously, in violation of good faith and contrary to the purpose for which he received the bill, afterwards, to wit, on &c. delivered the bill to *Hunter*, and *Hunter* then took and received the same from *Lewis Levy* upon other and different terms, and without discounting the same for the defendant, and contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose and under colour and pretence of securing a certain debt then alleged to be due from *Lewis Levy* to *Hunter*. And the defendant avers, that *Hunter* was not at any time a *bonâ fide* holder of the bill for value or consideration in that behalf given, and also that the plaintiff was not at any time nor now is a *bonâ fide* holder of the said bill for value or consideration in that behalf; and that the defendant had never received any consideration or value whatsoever from *Lewis Levy* or from *Hunter* or from the plaintiff. Verification. The 3d plea set up a defence of usury. Replication to the 2d plea, de injuriâ.

At the trial before Lord *Denman* C. J. at the sittings after Hilary term 1837, it appeared that Lord *Arthur Chichester* and Mr. *Rich* (the defendant) in 1836, were quartered with their regiment at Portsmouth, and being in want of money, they answered an advertisement in the newspapers offering loans of money. A Mr. *Levy* applied to them in consequence, and they put their names to bills to the amount of 1900*l.* which *Levy* took away with him on the pretence of getting discounted, but never returned. *Levy* sold the bill in question to one *Hunter* for bills and cash amounting to 75*l.* The plaintiff, who is a gunmaker in Piccadilly, carrying on business under the firm of *Forsyth & Co.* being

applied to by *Hunter* to discount the bill in question, agreed to do so, by giving 150*l.* in cash, and by delivering guns and pistols to the value of 150*l.* This arrangement was completed, and it was proved that *Hunter* immediately sold the guns, &c. to a pawnbroker for 50*l.* It also appeared that there had been many bill transactions between *Hunter* and the plaintiff, on which occasions the plaintiff had discounted the bills by giving half the amount in goods, which *Hunter* was in the habit of disposing of at one-third the value. On this issue Lord *Denman* told the jury that if they were of opinion that the plaintiff had given value for the bill, they should find a verdict for him. Verdict for the plaintiff accordingly on all the issues.

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Sir *W. W. Follett* obtained a rule nisi for a new trial in the subsequent Easter term, on the grounds of the verdict on the third issue being against evidence, and of his lordship having misdirected the jury on the second issue, in not having left to them to say whether the plaintiff was a fraudulent holder of the bill, and he cited *Gill v. Cubitt* (a) and *Beckwith v. Corral* (b).

Platt shewed cause in Michaelmas term last(c). The question on the second issue (d) is, what does the averment of the plaintiff being a *bonâ fide* holder for value amount to? It means that the plaintiff has either given value for the bill, or that he is to do so, and it is submitted that proof of this was fully made out. If, where goods are given for a bill, the sale is simulated, then the party does not become a *bonâ fide* holder of the bill; so, if goods are purchased of a bankrupt under circumstances which shew that the transaction is not honest, it is not a *bonâ fide* purchase; *Devas v.*

(a) 3 B. & C. 466; S. C. 5 D. Coleridge Js.
& R. 324.

(b) 3 Bing. 444.

(c) Nov. 17th, before Lord *Denman* C. J., *Patteson*, *Williams* and

(d) On cause being shewn, the Court was of opinion that the rule should be made absolute for a new trial on the third issue.

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Venables (a). The cases of *Gill v. Cubitt* (b), and *Beckwith Corral* (c), which have been relied on to shew that the plaintiff is not a *bonâ fide* holder, have been thought to go too far, and are in fact overruled by *Backhouse v. Harrison* (d), and *Goodman v. Harvey* (e). [*Coleridge J.* Is not the question this, viz. whether a holder for value and a *bonâ fide* holder for value mean the same thing?] It is submitted that the cases shew they are identical. If it had been intended to prove that the plaintiff was privy to any fraud, the defence should have been pleaded, by which notice would have been given to the plaintiff as to the defence to be relied upon. [*Coleridge J.* Perhaps, then, you ought to have demurred on the ground that this is an imperfect allegation of fraud.] The allegation only means that value has not actually been paid, and therefore there is no defect which a verdict will cure. If the goods were to be returned, or the plaintiff's name was lent, he would not be a *bonâ fide* holder for value.

Sir *W. W. Follett* contra. The question on this issue was one entirely for the jury. Before the new rules the defence would have been admissible under non-assumpsit, and would have entitled the plaintiff to a verdict. Now, under the allegation that the plaintiff is not a *bonâ fide* holder, the same defence may be given. The old rule as to bills of exchange was, that, as soon as fraud was shewn in the indorser of the bill, the indorsee was called upon to prove not only that he gave value for the bill, but that he took it in the *ordinary course of business*. This rule still exists, and is quite untouched by the difference of opinion which has existed as to bills taken without consideration. Thus in *Bayley on Bills*, p. 471 (f), it is distinctly laid down that when fraud appears the onus is thrown on the holder,

(a) 3 Bing. N. C. 400.

(b) 3 B. & C. 466; S. C. 5 D.

& R. 324.

(c) 3 Bing. 444

(d) 5 B. & Ad. 1098; S. C. 3 N.


& M. 188.

(e) 4 A. & E. 870; S. C. 6 N. &

M. 372.

(f) 5th ed.

not only to shew that he gave value, but that he is the *bonâ fide* holder. The doctrine in *Gill v. Cubitt* (a) was, that *bona fides* comprehended not only the giving value for a bill and the taking it in the ordinary course of business, but also that due caution had been exercised. It is only this latter portion of the doctrine that has been overruled. The law laid down in *Lawson v. Weston* (b) is re-established; but though it is now clear that gross negligence alone will not defeat a party's title on a bill, still if fraud appears, and any collusion in the holder with the party who obtained it by fraud, the holder cannot recover even if he gave full value. This clearly appears by *Crook v. Jadis* (c), *Backhouse v. Harrison* (d), and *Goodman v. Harvey* (e). So again in *Mills v. Barber* (f), the rule was recognised that when the title of the holder of a bill is impeached on the ground of fraud, the onus is cast upon him of proving his title. As to the form of the plea, the only question is, whether the allegation of being a *bonâ fide* holder is language recognised by the law. But *Devus v. Venables* (g) is a complete authority on this point. There, in trover by the assignees of a bankrupt for goods sold by the bankrupt, the defendant pleaded, that he bought the goods without notice of the act of bankruptcy and really and *bonâ fide* paid for the same. Upon issue joined as to the *bona fides* it was held to be open to proof that the transaction was not an honest one. It was contended there, as here, that "really and *bonâ fide*" meant only actually, but the Court held that the words *bonâ fide* raised the question whether the money had been paid in the course of an honest transaction. *Ward v. Clarke* (h) is an authority to the same effect as to the meaning put upon *bona fides* before the new rules. The Court may perhaps hold that it is not sufficient to allege that the plaintiff was

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(a) 3 B. & C. 466; 5 D. & R. 324.

(b) 4 Esp. 56.

(c) 5 B. & Ad. 909; S. C. 3 N. & M. 257.

(d) 5 B. & Ad. 1098; S. C. 3 N. & M. 188.

(e) 4 A. & E. 870; 6 N. & M. 373.

(f) 1 M. & W. 425.

(g) 3 Bing. N. C. 400.

(h) Moo. & M. 497.

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not a *bonâ fide* holder, but that the plea ought to go on to allege how he is connected with the fraud: it is submitted, however, that the new rules do not throw this burden on the defendant. [*Patteson* J. You appear to contend, then, that it would be sufficient to allege the facts as to the fraud between *Levy* and *Hunter*, and then call upon the plaintiff to prove his title.] The doctrine in *Mills v. Barber* (a) would seem to warrant such a position. In *Bramah v. Roberts* (b) the question turned upon the replication. The plea by the acceptor of a bill of exchange was, that it was to the knowledge of the holder negotiated to him by fraud, and that there was not any value given in good faith for the indorsement to the holder. The replication averred generally, that it was indorsed to the plaintiff fairly and in good faith, and it was held on demurrer that it was not necessary to plead specifically a good consideration.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court:—This was an action by the indorsee against the acceptor of a bill of exchange. The second plea stated that the bill had been accepted and indorsed to *Levy* for a special purpose, who in fraud of that purpose had handed it to *Hunter*, and that *Hunter* handed it to the plaintiff *not for good and valuable consideration, and that the plaintiff was not the bonâ fide holder*. The replication was *de injuriâ*. At the trial I held that these pleadings put in issue nothing but the fact of a consideration having been given, and that the defendant was not at liberty to shew that the plaintiff knew of the fraud, but should have pleaded that knowledge in distinct terms. On the motion for a new trial other points were disposed of, and the only question now remaining is, what meaning is to be given to the words in the plea that the plaintiff was not the *bonâ fide* holder of the bill. With respect to the doctrine laid down in *Gill v.*

(a) 1 M. & W. 425.

(b) 1 Bing. N. C. 469.

Cubitt (a), and other cases, we adhere to the more recent decisions, and to what is said in *Goodman v. Harvey (b)*, that gross negligence alone would not be a sufficient answer—that it may be evidence of mala fides, but is not the same thing. It follows that, in pleading, mala fides must be distinctly alleged; and the sole question is, whether mala fides is alleged by the words “that the plaintiff was not the bonâ fide holder of the bill.” The case of *Devas v. Venables (c)* is not in point, for that was a decision upon the meaning of the words bonâ fide in a particular act of parliament, which was construed with reference to the subject-matter and the context. Neither is the case of *Bramah v. Roberts (d)* an express authority, as the decision turned on other words in the plea, and the question does not appear to have arisen in any other case. Now the words in question must be taken with reference to the other allegations in the same plea, and, being so taken, their proper meaning would seem to be that the plaintiff was merely a collusive holder, not really interested in the bill himself, but only lending his name to *Hunter*; and then they do not go beyond the allegation that he had not given good and valuable consideration, evidence of which was admitted. But it is contended that their meaning is that the plaintiff took the bill under such circumstances that he must be considered to have known of the fraud set forth in the plea. We do not see how such a meaning can fairly be attributed to them, and are of opinion that the only proper mode of implicating the plaintiff in the alleged fraud by pleading is to aver *that he had notice of it*, leaving the circumstances by which that notice is to be proved directly or indirectly to be established in evidence, and we cannot treat the allegation that the plaintiff was not bonâ fide holder as equivalent to such an averment. It is not necessary to give any opinion on any supposition that the words could be taken without reference to the other allegations in the

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(a) 3 B. & C. 466; S. C. 5 D. & M. 372.

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(c) 3 Bing. N. C. 400.

(b) 4 Ad. & E. 870; S. C. 6 N.

(d) 1 Bing. N. C. 469.

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plea, but we wish it to be understood that we by no means intend to say that even if taken simply they would have any other meaning than that which we have now given them.

The rule for a new trial has been already granted, on the ground that the verdict was against evidence, but as the Court think that the direction was quite right, that rule must be upon payment of costs.

Rule discharged on the second issue.

Saturday,
June 22d.

The QUEEN v. The INHABITANTS of BRIDGEWATER.

1. The parish of B. contains the borough of B., which is not coextensive with the parish, and which before the Municipal Corporation Act had a quarter sessions with jurisdiction over the whole parish. The borough had not six justices, and therefore the parish had the power of appealing to the county sessions against a poor's rate under 1 G. 4, c. 36. The Municipal Corporation Act threw the

ON an appeal against a rate for the relief of the poor of the parish of Bridgewater, on the ground that George Aubrey and others were inhabitants of the parish, possessing stock in trade within the parish producing profit, in respect of which they were not assessed, the Somersetshire quarter sessions amended the rate, subject to the opinion of this Court on the following case.

The whole of the borough and parish of Bridgewater is within the county of Somerset. Bridgewater is a borough, having a recorder and court of quarter sessions, under 5 & 6 Will. 4, c. 76. Before the passing of that act the borough of Bridgewater had justices of its own and a right to hold separate quarter sessions, but their charter had no non-intromittant clause. The ancient borough contained a part only of the parish, but the jurisdiction of the borough justices was co-extensive with the parish. The boundaries of the borough were altered by 5 & 6 Will. 4, c. 76, and the present boundaries exclude some parts of the parish of Bridgewater, and include several small parts of two adjoining parts of the parish into the county jurisdiction: Held, that sect. 111 did not take away the power of an inhabitant in the outlying parts of the parish to appeal against a poor's rate to the county sessions, and that the sessions might amend or quash the whole rate.

2. *Quære*, whether a parish, part of which is in a borough of exclusive jurisdiction and part in a county, and which had more than six justices at the time of passing Municipal Corporation Act, has the power of appeal anywhere against a poor's rate

ing parishes, namely, Hembdon and Durnleigh. Since, and under the authority of the Municipal Reform Act, a separate court of quarter sessions has been granted to this borough (which grant may be taken as part of this case), but the borough justices and the recorder have no jurisdiction beyond the limits of the borough. Before the Municipal Corporation Act the borough had only four justices, but at the time of this appeal there were seven justices for the borough, and it was then divided into two wards. The appellant lives, and the whole of the land for which he is rated is situate, in that part of the parish without the limits of the borough. All the persons, the omission of whose stock in trade from the rate was objected to by the appellant, are inhabitants of that part of the parish which lies within the limits of the borough, and the whole of their stock in trade is within that part of the parish of Bridgewater which is within the borough. The rate was drawn out according to the form prescribed in the schedule to the Parochial Assessment Act, 6 & 7 *Will.* 4, c. 96. The declaration set forth at the foot of that schedule was written at the foot of the rate and signed by the churchwardens and overseers, and the rate so signed was allowed on the 6th of October 1838, by two justices of the county of Somerset, and by three justices of the borough of Bridgewater. The parts of the rate which applied to the inhabitants residing within the borough are distinct and separate from those parts which apply to the inhabitants residing without the borough, but the whole is only one rate. The declaration signed by the churchwardens and overseers, and the allowance by the justices, are at the foot of the whole rate. It was objected, on the part of the respondents, that on the facts above stated the county quarter sessions had no jurisdiction to hear the appeal. One rate for the relief of the poor has hitherto been made for the whole parish, and it has been the practice previously and up to and inclusive of a rate made in February, 1838, to rate inhabitants for their stock in trade and for their ships whenever the home of the ship was in Bridgewater, but neither stock in trade nor

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ships were included in the rate appealed against. The several persons respectively named in the said notice had stock in trade producing profit within the parish, and if liable to be rated at all, were liable to be rated to the amount set opposite to their names in the amendment. The questions for the opinion of the Court were: 1st. Whether the county sessions had jurisdiction to try this appeal? 2dly. Whether the inhabitants were rateable in respect of their stock in trade? If the Court should be of opinion that the county sessions had jurisdiction to amend the rate, and that the inhabitants were rateable in respect of their stock in trade, then the order of the Court for amending the rate is to be confirmed.

If the Court should be of opinion that the county sessions had no jurisdiction to amend the rate, but have jurisdiction to quash either the whole rate, or those parts which apply to persons residing without the borough, and that stock in trade is rateable, then the rate is to be quashed accordingly.

If the Court should be of opinion that the court of quarter sessions, under these circumstances, had no power to amend the rate as aforesaid, or to quash the rate, or any part of it, the rate is to be confirmed.

Bere and *M. Smith*, in support of the order of sessions. *Reg. v. Lumsdaine* (a) has determined the question as to the rateability of stock in trade. The remaining question arises on sect. 111 of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), which enacts that after May, 1836, the justices of the county in which any borough is situate, to which a grant of quarter sessions shall not have been made, "shall exercise the jurisdiction of justices of the peace in and for such borough, as fully as by law they and each of them can or ought to do in and for the said county; and no part of any borough, in and for which a separate court of quarter sessions of the peace shall be holden, shall be within the jurisdiction of the justice of any county from which such borough, before the passing of

(a) 1 Perr. & Da. 219.

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his act, was exempt, any law, &c. to the contrary notwithstanding." The object of the first part of this section was to give county justices jurisdiction in boroughs of exclusive jurisdiction, before the passing of that act, but to which no warrant of quarter sessions should be made; the second part of the section was intended to leave the jurisdiction of county justices in boroughs *with* quarter sessions exactly as it was before the passing of the act. Before that act, county justices had jurisdiction in Bridgewater on appeals against rates. The charter of Bridgewater contained no non-intromittant clause, and this fact is very important. The right of appeal to the county sessions existed under the 43 *Eliz.* c. 2, s. 6, for the recorder of the borough being either "mayor, bailiff, or head officer," is not contemplated by sect. 8 of that statute, which gave jurisdiction in certain cases to the corporation justices. At all events the county justices must always have had a concurrent jurisdiction, because that can be taken away only by express words, *Blankley v. Winstanley* (a). It is true that 17 *Geo.* 2, c. 38, s. 4 and 5, gave the appeal to the quarter sessions of corporations exclusively, in all cases where there were four justices in the corporation, and that Bridgewater had four justices before the passing of the Municipal Corporation Act. But sect. 111 of this act must be considered to have repealed, pro tanto, those sections in the former act, or otherwise the former part of section 111 would be inoperative. It may happen that in many boroughs, not affected by the Municipal Corporation Act, there are still six justices, in which case, under 1 *Geo.* 4, c. 36, there would be an exclusive jurisdiction for appeals in the corporation sessions; but it is not necessary to consider this point, because Bridgewater had not six justices, and therefore there was always a concurrent jurisdiction in county justices up to the 6 & 6 *Will.* 4, c. 76. It is submitted, therefore, that the county justices had jurisdiction, and might quash or amend the whole rate under 41 *Geo.* 3, c. 23. 2. But if the

(a) 3 T. R. 279.

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Court should think the county justices have no jurisdiction over the whole rate, they have certainly jurisdiction over that part of the parish situate without the borough. An inhabitant of that part of the parish could not appeal to the borough, because not within the limits of its jurisdiction, and therefore if the argument on the other side be correct, such inhabitant has no right of appeal at all. But as sections 7 and 8 of the Municipal Corporation Act have made that part of the parish part of the county, the right to appeal under 43 *Eliz.* c. 2, accrues. This view is confirmed by 7 *Will.* 4, and 1 *Vict.* c. 78, s. 30, which transfers all matters cognizable under any local act or otherwise by borough justices, to county justices, where the place has ceased to form part of the local jurisdiction. On this view the Court may either amend the rate as to the parts within the county, or may quash it altogether as to that part.

Sir J. Campbell A. G. and Kinglake, *contra*.—The right of appeal is founded on act of parliament, it lies therefore on the other side to point out the statute which gives jurisdiction to county magistrates in this case. Section 9 of 43 *Eliz.* c. 2, provides for the case where a parish lies part within the limits of a borough, and part without, as to the appointment of overseers, &c., but does not contemplate the present case. Under that section the rate must be for the whole parish, and, the rate being one and entire, it would be absurd to attribute jurisdiction to borough justices over one portion of it, and to county justices over the other. It is said that there is nothing to take away the concurrent jurisdiction of county justices, but that is a fallacy, for they never had it. Borough justices had an exclusive jurisdiction over all rates made for any parish within a corporate town; *Rex v. St. Mary in Taunton* (a), *Rex v. the Justices of Essex* (b). It is not however contended that in this case there would be an appeal to the borough sessions; it is sufficient to shew that it is *casus omissus*. The Municipal

(a) 1 Bott, P. L. 283.

(b) 5 Mau. & S. 513.

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Corporation Act has been relied upon, but it does not touch the case, it so happens that ss. 111, 7 and 8, transfer a portion of the parish from the borough to the county, but that is a mere alteration of the facts and locality, and leaves the law as it was. In many cases, where only part of a borough was within the parish, it had been a practice to make a separate rate, and appoint separate overseers for the part called the foreign without the borough, and, if such has been the practice for sixty years past (which cannot be pretended here), it is legal by the 59 Geo. 3, c. 95, though, previous to that act, the practice was bad, *Rex v. Gordon* (a). A similar interposition of the legislature is required in the present instance. The effect of the Municipal Corporation Act has been to divide the parish of Bridgewater into separate jurisdictions, in which case no act of parliament has allowed an appeal to be made to the county justices. There are many similar cases in which a parish is situated partly within a county and partly without, and it has been held that the county has no jurisdiction over the whole parish. Thus in *Rex v. Butler* (b) it was held, that the overseers for such a parish must be appointed by four justices, two for each jurisdiction. So in *Rex v. Weston* (c), where a parish was situated in two counties, and the part of the parish in one county was indicted for not repairing its highways, the indictment was held good ex necessitate, and the Court held that the county had no jurisdiction whatever over that part of the parish without its limits. It is true that case was overruled by *Rex v. Clifton* (d), so far as respects the necessity of having the parties, against whom an indictment for non-repair is brought, within the jurisdiction of the county, but the dicta of the learned judges remain unimpeached. [*Patteson J. Rex v. Clifton* (d) overrules *Rex v. Weston* (c) in terms as strong as could be used, and without any qualification whatever.]

(a) 1 B. & Ald. 524.

(c) 4 Burr. 2507.

(b) 4 Burn's Just. (by D'Oyley & W.) 161.

(d) 5 T. R. 502.

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LORD DENMAN C. J.—Looking at the different acts on this subject, from the 43 *Eliz.* down to the 1 *Geo.* 4, c. 36, I think, in the case of a parish situated like the present, there was an appeal to the county sessions. Then sect. 111 of the Municipal Corporation Act enacts, that no part of any borough which has a court of quarter sessions shall be within the jurisdiction of county justices, from which such borough was exempt before the passing of the act. Bridgewater, not being exempt, does not come within this provision, and therefore remains subject to this jurisdiction. The Boundary Act (6 & 7 *Will.* 4, c. 103) ought to have provided for the case of a parish situated like this, so as to have allowed the appeal for the entire parish to the borough sessions, which would be much more convenient, but, as it has not done so, we cannot supply the defect.

PATTESON J. (*a*)—The question turns entirely on the construction of section 111. The general point is a very curious one, for it may be that, in certain cases, where a parish is situated partly within a borough, and partly within a county, the latter part may have no right of appeal anywhere, and that it is a *casus omissus* under the 43 *Eliz.* c. 2. It is not however necessary to go into this point, as it does not arise in the present case, for here the whole parish, before the passing the 5 & 6 *Will.* 4, c. 76, was within the jurisdiction of the borough justices. Up to the passing the 17 *Geo.* 2, there can be no doubt on this head. Nor did that statute make any difference, because Bridgewater always had four justices. But then came 1 *Geo.* 4, c. 36, which gave a concurrent jurisdiction to the county justices, because Bridgewater had not more than six justices. It must be conceded, therefore, that after that statute there might have been an appeal to the county as well as to the borough sessions. The Municipal Corporation Act then takes away (sect. 8) part of the parish from the borough,

(*a*) *Littledale* J. was sitting at the Central Criminal Court.

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and gives it to the county, both as to locality and jurisdiction. The question therefore arises whether these circumstances bring themselves within the *casus omissus* alleged to exist on the 43 *Elix.* It is very extraordinary if the Court should be obliged so to construe an act as to bring a parish within a *casus omissus* in which it ought never to have been placed, and we should certainly be very unwilling to adopt such a construction. But it might be so, though no case has ever been decided upon the point. Section 111 enacts that no part of the borough shall be within the jurisdiction of county justices, if exempt before the passing of the act, and if Bridgewater had had more than six justices before that time, the point certainly would have arisen. But here the whole of the parish had the opportunity of appealing to the county at large, and I see nothing in sect. 111 to alter that power, but think it was intended to leave matters as to jurisdiction exactly *in statu quo*, and that, as an appeal, before passing the act, would lie from the whole parish to the county, so it will now. No argument has been urged as to the existence of more than six justices at present, nor could there well be, because the functions of borough justices, under the existing corporation law, are totally different from what they were before the passing the act.

WILLIAMS J.—It is alleged here that the appellant is seeking to make an alteration in the state of things in a borough, with which he is wholly unconnected. But at the time of passing the 5 & 6 *Will.* 4, c. 76, there was an appeal to the county sessions, and that statute has not altered the law in that respect. The appellant therefore is only using a power which he enjoyed before.

Rate confirmed as amended by the Sessions.



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*Saturday,
June 23rd.*

JONES v. FLINT.

1. A contract, by which the defendant was to give 45*l.* for crops of growing corn and potatoes, and the stubble afterwards and whatever lay grass was in the fields, the defendant to harvest the corn and dig the potatoes, and the plaintiff to have the liberty of turning his own cattle on, and to pay the tithe,—is not a contract for the sale of an interest in land; for the growing crops are mere chattels, and with regard to the grass, as the plaintiff did not part with his possession of the soil, the contract was to be construed as an agistment of the defendant's cattle by the plaintiff.

2. *Quære*, whether the defence that there is no

note in writing of the contract under sect. 4 of the Statute of Frauds, need be pleaded specially (a).

3. *Quære*, whether a plea of a tender of part of the sum claimed in the declaration, there being only one contract proved, admits the contract.

DEBT for 45*l.*, for crops of growing wheat and barley of the plaintiff bargained and sold, and by the defendant, by virtue of that bargain and sale, accepted, reaped, cut down, had, taken and carried away, and for divers quantities of potatoes bargained and sold, and by the defendant, by virtue of that bargain and sale, accepted, dug up, had, taken and carried away, as also for the use of certain land of the plaintiff, and the eatage of grass, clover, and stubble thereon growing and being, by the plaintiff before then let to the defendant at his request, and by the defendant, according to such letting, had and used in and for the depasturing of cattle for a long time before then elapsed. There was also a count on an account stated.

Pleas: 1. As to all except 35*l.* 11*s.* 10*d.* parcel &c., *nunquam indebitatus*. 2. As to 5*l.* parcel of the monies in the declaration mentioned, and of the said 35*l.* 11*s.* 10*d.* in the first plea mentioned, payment of 5*l.* in satisfaction and discharge of the said 5*l.*, parcel &c. 3. As to 30*l.* 11*s.* 10*d.* other parcel of &c., and of the said 35*l.* 11*s.* 10*d.* &c. tender and payment of that sum into Court.

The replication took issue on the first plea, and traversed the payment and tender in the second and third pleas. Issue thereon.


The plaintiff in his particulars of demand claimed 45*l.*, as well for a crop of growing wheat, and a crop of growing barley in the plaintiff's land, and a quantity of potatoes also growing there, sold by the plaintiff to the defendant on the 7th August, 1833, as also for the use of certain land of the plaintiff, and the eatage of grass, clover and stubble thereon growing.

(a) Decided that it need not be pleaded; *Buttermere v. Hayes*, 5 M. & W. 456. That case was decided the 19th June, and was acted on by this Court the same day with respect to the 17th section, in *Eastwood v. Kenyon*. See the case, *post*, Hil. T. 3 P. & D.

At the trial before *Bosanquet J.* at the Denbighshire spring assizes 1837, it appeared that the sum in dispute between the parties was 9*l.* 8*s.* 2*d.* The plaintiff proved, that on the 7th August, 1835, there was a verbal contract made between him and defendant for some growing crops of wheat and barley on the plaintiff's land, for which the defendant agreed to give 45*l.*, and he was to have included some potatoes also growing on the land, and the stubble crop up to the 30th November. The plaintiff was to have the liberty of turning in two cows and a heifer, and was to pay the tithe. The witnesses stated on cross-examination, that the defendant was to have the whole in the fields, including the lay grass, which he might mow if he liked. *Jervis*, for the defendant, contended that this was a contract for an interest in land, and that there ought to have been a note of it in writing under s. 4 of the Statute of Frauds, and cited *The Earl of Falmouth v. Thomas*(a). The learned judge reserved the point. The defendant then attempted to shew that the contract was for so much per acre, but the jury found for the plaintiff for the whole sum claimed, 9*l.* 8*s.* 2*d.*

Jervis in the ensuing Easter term obtained a rule nisi to enter a nonsuit, against which

Kelly and *Welsby* shewed cause in Hilary term last (b). 1. Whether the contract falls within the fourth section of the Statute of Frauds or not, the defendant has admitted the contract, by pleading a tender and payment of money into Court. [*Coleridge J.* How can the admission made in one plea be called in aid of the issue joined on another?] It is conceded that it could not, and if there were more than one contract, the payment into Court would admit only one legal contract, *Meager v. Smith*(c), but, if it appear by the evidence that there is only one contract to

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First point:
 Payment into
 Court of part
 of the sum
 claimed ad-
 mits the con-
 tract where it
 is entire.

(a) 1 C. & M. 89.

lums and *Patteson Js.*

(b) January 24th, before Lord
Denman C. J., Littledale, Wil-

(c) 4 B. & Ad. 673; S. C. 1 N.
 & M. 449.

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second point:
Whether the
Statute of
Frauds need
be pleaded.

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which the payment would apply, the payment admits the contract, *Ravenscroft v. Wise* (a), *Middleton v. Brewer* (b).

2. But supposing the question to arise on the fourth section of the Statute of Frauds, still the objection cannot be taken under the general issue. It is true that the Court of Exchequer has expressed a strong opinion in *Johnson v. Dodgson* (c), that the statute need not be pleaded, but a contrary decision has been come to by the Common Pleas in *Barnett v. Glossop* (d); the question therefore is still open. The decision in *Shearwood v. Hay* (e) on an apothecary's bill may be laid out of consideration. [Lord Denman C.J. That proceeded entirely on the language of the Apothecaries' Act (55 Geo. 3, c. 194).] Just so. Then when the language of the new rule is considered, that "all matters in confession and avoidance, not only those by way of discharge, but those which shew the transaction to be either void or voidable (f)," shall be specially pleaded, it seems impossible to contend that this case does not come within its terms and spirit. For what purpose is the evidence sought to be given? To shew that the transaction was a contract for an interest in and concerning land, and therefore void under the 4th sect. of 29 Car. 2, c. 2.

Third point:

A sale of growing crops and stubble, not a sale of an interest in land.

It may be said that this section does not make the contract void, but only prevents the party suing upon it, but a *Carrington v. Roots* (g) it was clearly held that a par agreement under that section was absolutely void. It / contract was not a sale of any interest in lands. It / nearly expressly within *Evans v. Roberts* (h), where it held that the sale of a growing crop of potatoes was contract within the fourth section. [Williams J. I case the owner of the land was to dig the potatoe the defendant was to dig them.] There is that div certainly. But these agreements are so frequent

(a) 1 C. M. & R. 203.

(b) 1 Peake's N.P.C. 20.

(c) 2 M. & W. 653

(d) 1 Bing. N.C. 633.

(e) 5 A. & E. 383; S. C. 6 N. & M. 831.

(f) Reg. Gen. Hil Assumpsit 3.

(g) 2 M. & W. 24

(h) 5 B. & C. 87 & R. 611.

tice, that it is highly desirable to hold that they are all personal contracts, not for the sale of any interest in land, but for mere goods and chattels. It is true that the purchaser must often go on the land to cut and secure the crops, but that he may do by way of easement, without having any interest in the soil, and if he did anything more he would be a trespasser. The tendency of the Courts has been to relax the strict rule formerly laid down: *Parker v. Staniland* (a), *Carrington v. Roots* (b), *Sainsbury v. Matthews* (c), in which last case, notwithstanding that the purchaser of a standing crop of potatoes was to dig them himself, the Court held, that the contract was not within the fourth section.

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Jervis and Meeson, contra. 1. The argument for the First point. plaintiff attempts to assimilate the effect of a plea of tender to the practice of paying money into Court before the new rules; but there is an essential difference. Money used to be paid into Court under a rule, and after the defendant had received the declaration, and therefore he might be taken to have admitted the contract set out in it. But how can a tender before declaration be said to admit whatever contracts the plaintiff afterwards chooses to sue upon? Payment into Court is required to make the plea of tender available, and, if the plaintiff has several claims against the defendant, some valid and some illegal, a tender and payment into Court is the only mode the defendant can adopt to discharge himself of his liability. It is preposterous therefore to contend that he admits by it the invalid contracts. Tender, therefore, never can amount to more than payment before action brought. 2. *Johnson v. Dodgson* (d) was decided subsequently to Second point. *Barnett v. Glossop* (e); the latter case, therefore, may be considered as overruled. In *Elliott v. Thomas* (f) it was

(a) 11 East, 362.

(b) 2 M. & W. 248.

(c) 4 M. & W. 343.

(d) 2 M. & W. 653.

(e) 1 Bing. N. C. 633.

(f) 3 M. & W. 170.

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Third point.

considered as a settled point, that the defence of the Statute of Frauds may be resorted to under the general issue. In all the instances given in the new rules as to the necessity of special pleas, such as infancy, coverture, release &c., a contract exists, which the plea must confess and avoid; in this case, the effect of the plea would be to deny the contract altogether. 8. It is not contended that, if the contract had been merely for the growing crops and potatoes, it would have fallen within the fourth section of the Statute of Frauds, because in such cases the land is considered merely as a warehouse where the chattels are deposited, but here the defendant was to have the grass in the fields up to the 30th November, and therefore was to have the natural vesture of the land, which in law is equivalent to the land itself, and therefore the case falls within *Crosby v. Wadsworth* (a); *Earl of Falmonth v. Thomas* (b), *Carrington v. Roots* (c).

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an action of indebitatus assumpsit for a crop of growing wheat and barley, reaped and taken away by the defendant—for a crop of potatoes dug up and taken away—and for the use of land and eatage of grass, clover &c. thereon growing. A motion for a nonsuit was made, by leave, on the ground that the contract proved, which was oral only, was for an interest in land; this was denied in answer, and it was also contended that the state of the pleadings precluded the defendant from taking the objection.

The contract was made in August, when the crops were not ripe, though nearly so, and the witnesses who proved it, stated it thus: "that the defendant should give 45*l.* for the crop of corn, and the profit of the stubble afterwards, but the plaintiff was to have liberty for his cattle to run

(a) 6 East, 602.

(c) 2 M. & W. 248.

(b) 1 Cr. & M. 89.

with the defendant's; defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; the defendant was to harvest the corn and dig up the potatoes; the plaintiff was to pay the tithes. There was some dispute upon the evidence, whether it was a sale by the acre or not. Nothing, it will be observed, was expressly agreed on as to the possession of the land. It will be our duty, therefore, in construing the contract as to this particular, to have regard to its subject-matter, and to imply so much, and only so much, as is necessary to give full effect to its expressed terms, nothing appearing in the subsequent acts of the parties to influence our construction either way. Three things were the subject-matter of the contract, crops of corn, potatoes, and the after eatage of stubble and lay grass, of these all but the lay grass are *fructus industriales*, as such they are seizable by the sheriff under a fieri facias, and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as quite settled, that the contract would have been held to be a contract merely for the sale of goods and chattels. And although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined from this their original character not to be on that account a contract for the sale of any interest in land. *Evans v. Roberts* (a) proceeds on this principle: that was a sale of growing potatoes; *Holroyd J.* says, page 837, "this is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right by virtue of his contract to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute." And *Littledale J.* says, p. 840, "I think that a sale of any growing produce of the earth reared by labour and expense, in actual existence at the time of the contract, whether it be in a state of maturity

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(a) 5 B. & C. 829; S. C. 8 D. & R. 611.

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or not, is not to be considered a sale of an interest in or concerning land within the meaning of the fourth section of the Statute of Frauds." *Bayley J.* lays down the same principle, and qualifies, not the judgment, but the dictum of *Mansfield C. J.* in *Emmerson v. Heelis* (a), which certainly is at variance with the decision of the Court of King's Bench in *Evans v. Roberts* (b); it was a dictum however unnecessary to the decision. The present case differs from *Evans v. Roberts* (b) in this, that there the potatoes were to be dug up by the seller; the judgments, however, did not proceed on this distinction, although it was not unnoticed. *Holroyd J.* expressly says, "even if they were to be dug up by the buyer I think he would not have had an interest in the land." And we agree that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land. Tried by these tests we think that, if the lay grass be excluded, the parties must be taken to have been dealing about goods and chattels, and that an easement of the right to enter the land for the purpose of harvesting and carrying them away, is all that was intended to be granted to the purchaser. It is very difficult to reconcile all the cases, and still more so all the dicta on the subject, from the case of *Waddington v. Bristol* (c) to the present time, and we are therefore left at liberty to abide by a general principle. Upon this principle, however, we are to examine whether the introduction of the lay grass into the contract ought to vary the decision. This is the natural produce of the land, not distinguishable from the land itself in legal contemplation until actual severance; it passes accordingly to the heir, not to the executor, and in *Crosby v. Wadsworth* (d) it was decided that the purchaser of a crop of mowing grass, unripe, and

(a) 2 Taunt. 38.

(c) 2 B. & P. 452.

(b) 5 B. & C. 829; S. C. 8 D.

(d) 6 East, 602.

& R. 611.

which he was to cut, took an exclusive interest in the land before severance. If therefore this be a case in which the parties intended a sale and purchase of the grass to be mowed or fed by the buyer, both on principle and authority the objection of the defendant must prevail. Looking however at the facts, we think this was not such a bargain: it may well be doubted upon all the evidence, whether any thing that could be called a crop of grass was in the ground or in the contemplation of the parties at all, for it does not appear that any clover or other grass had been sown with the corn, and the word grass seems merely to have been adopted by the witness in cross-examination from the defendant's counsel. But, not relying upon this, we find that the plaintiff was to pay the tithe, and that after the harvesting he reserved to himself the right of turning his own cattle into the fields, and we think that, however expressed, the more reasonable construction of the contract is, that the possession of the field still remained with the owner after the harvesting as before; it was not necessary to the vendee before, on account of the grass, because that, whatever it was, could not then be got at, nor did it need preservation, and afterwards it is more reasonable to consider the owner as agisting the vendee's cattle, than as having his own cattle agisted by him, whose interest at the best was of so very limited a nature. Upon these grounds, not impeaching the principle of *Crosby v. Wadsworth* (a), but deciding on the additional facts in this case, we think this incident in the contract does not alter its nature, and the objection founded on the statute will not prevail. This makes it unnecessary to consider the other points, and the rule will be discharged.

Rule discharged.

(a) 6 East, 602.

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RANDELL v. WHEBLE.


A sheriff is not liable, under the Uniformity of Process Act, for neglecting to arrest on a *capias ad respondendum* within the four months, unless special damage accrue; and *semble*, that he is in no case liable, unless it appears that he has been guilty of some default, when the writ was returnable either on his being ruled to return, or at the expiration of the four months. Therefore where a declaration alleged that a writ of *capias ad respondendum* was delivered to the sheriff, to be executed against *R. T.*, and that the sheriff did not arrest in a reasonable time, and that *R. T.* did not cause bail to be put in ac-

cording to the exigency of the writ, whereby the plaintiff was injured and likely to lose his debt:—Held, that the action was not maintainable, as it was consistent with the facts alleged that the sheriff might have arrested *R. T.* after the negligence averred, so as to enable the plaintiff to have proceeded with his original action as speedily as if the sheriff had made the arrest on the first opportunity.

If the sheriff neglects to arrest when he has an opportunity, he has still eight days to put in bail, as if he had actually arrested, and permitted an escape.

CASE. The declaration stated, that one *R. Thomas*, heretofore, to wit, on &c., was indebted to the plaintiff in a large sum of money, exceeding 20*l.* to wit the sum of 50*l.* &c., and he the said *R. Thomas* being so indebted, the plaintiff for the recovery of his debt afterwards, to wit, on &c. sued out of his majesty's Court of King's Bench at Westminster in the county of Middlesex, against the said *R. Thomas* a *capias ad respondendum*, (setting out the writ and the indorsement,) directed to the sheriff of Berkshire. And which said writ so indorsed afterwards, to wit, on the day and year first aforesaid, was delivered to the defendant, who then and from thence hitherto hath been and was and still is sheriff of the county of Berks, in due form of law to be executed. And the plaintiff saith, that the said *R. Thomas* at the time of the delivery of the said writ to the defendant, so being such sheriff as aforesaid, and from thence hitherto was within the said sheriff's bailiwick, and the defendant, as such sheriff, at any time during that period could and might and ought to have taken and arrested the said *R. Thomas*, by virtue of the said writ at the suit of the plaintiff, if he would so have done, whereof the now defendant during all that time had notice. And that before the commencement of this suit, and after the delivery of the said writ as aforesaid to the defendant, so being and as such sheriff as aforesaid, to be executed, more than a reasonable time had elapsed for arresting and taking the said *R. Thomas* under and by virtue of the said writ. Yet the now defendant, not regarding the duty of his said office, but contriving and intending wrongfully and unjustly

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to injure the plaintiff, and to delay and hinder him in and from the recovery of his debt as aforesaid, hath not at any time, although often requested so to do, taken or caused to be taken the said *R. Thomas*, as by the said writ he was commanded, but therein hath wholly failed and made default, and hath wilfully suffered and permitted divers often and convenient opportunities and occasions of and for arresting and taking the said *R. Thomas* under and by virtue of the said writ to escape and pass by, and the said *R. Thomas* did not cause special bail to be put in for him in the said action in the said Court of our said lord the king according to the exigency thereof, or otherwise observe the requisition of the said writ, but therein wholly failed and made default, whereby the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same. And thereby also the plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out and expended and incurred in and about his said suit so commenced and prosecuted against the said *R. Thomas* as aforesaid, amounting together to a large sum of money, to wit, the sum of 100*l*.

Plea: that the plaintiff ought not further to maintain his said action against the defendant, because he says, that before the expiration of four calendar months from the date of the said writ, and before the defendant had been required to return the said writ by order of the said Court, or by any judge thereof or otherwise, to wit, on the 15th day of June in the year of our Lord 1837, by a certain order of the Honourable Mr. Justice *Coleridge*, then being one of the justices of the said Court of King's Bench, made in the action brought and prosecuted by the now plaintiff against the said *R. Thomas*, dated the day and year last aforesaid, it was amongst other things ordered, with the consent of the attornies on both sides in the said cause, and the plaintiff for certain valuable considerations undertook, promised and agreed with the said *R. Thomas* not to exe-

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cute or require the execution or return of the said writ, and waived and dispensed with the execution and return thereof by the now defendant, as such sheriff, and wholly discharged the defendant therefrom, whereby and by means whereof and the procurement of the plaintiff, and according to the course and practice of the said Court, the defendant was hindered, prevented and discharged thenceforth whilst the said writ was in force, from taking or causing to be taken the said *R. Thomas*, as by the said writ he was commanded, and it from thenceforth became unnecessary and improper for the said now defendant or the said *R. Thomas* to cause special bail to be put in for the said *R. Thomas* in the said action, according to the exigency thereof, or to otherwise observe the requisition of the said writ, and the defendant and *R. Thomas* were by the means and procurement of the plaintiff from thenceforth wholly hindered, prevented and discharged from so doing as they might and otherwise would have done. Verification.

Replication: That after the delivery of the said writ in the declaration mentioned, duly indorsed according to law in that behalf, to wit, as in the declaration is in that behalf mentioned, to him the defendant, to be executed as therein alleged, and before the said expiration of four calendar months from the date of the said writ in the plea mentioned, to wit, from the date of the said writ, hitherto the said *R. Thomas* was within the said sheriff's bailiwick, and the defendant as such sheriff at all times during that period could and might have taken and arrested the said *R. Thomas* by virtue of the said writ, at the suit of the plaintiff, whereof the defendant during all that time had notice as in declaration mentioned. And the plaintiff further saith, that the defendant having wholly neglected and refused to take and arrest the said *R. Thomas* for a long and unreasonable time after he had such notice last aforesaid, he the plaintiff commenced and prosecuted against the defendant the present action, and proceeded to declare therein against the now defendant for the cause in the declaration and in this plea

aforesaid. And the plaintiff further saith, that no such order, undertaking, promise or agreement, as in the last plea mentioned, ever was made until afterwards and long after the happening of all the matters above in this replication mentioned. And this the plaintiff is ready to verify.

General demurrer and joinder.

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Cowling now appeared in support of the demurrer. As no action lies against the sheriff upon the facts which appear in this declaration, it is unnecessary to consider the plea. Before the Uniformity of Process Act, the return day to the writ of *capias* was fixed in the writ itself, and the sheriff was not liable till the return. Now the sheriff has four months wherein to execute the writ, and he is not liable till the expiration of that time, unless he has been ruled to return the writ at an earlier period and made default. It is quite clear by the old law, that it was sufficient if the sheriff brought in the body on the return day of the writ on *mesne* process, and therefore he was not liable for an escape before that day, though on writs of execution it was otherwise: *Hawkins v. Plomer* (a). But the Uniformity of Process Act (2 Will. 4, c. 39,) has made no difference in the sheriff's responsibility, as Lord Abinger C.B. observed in *Brown v. Jarvis* (b). That case probably will be relied upon, and it will be said that the sheriff was bound to arrest within a reasonable time. But that also was the duty of the sheriff before that act, and if the sheriff then had neglected to arrest, and the party had died, he would have been liable. *Posterne v. Hanson* (c) shews that it was the duty of the sheriff to arrest on the first opportunity, and that it was only the 23 Hen. 6, c. 9, which allowed him to let the prisoner out on bail. But whether the sheriff took bail or not, permitted an escape, or neglected to make the arrest, he was never liable if he produced the body at the return day of the writ, *Atkinson v.*

(a) 2 W. Bl. 1048.

(c) 2 Saund. 59.

(b) 1 M. & W. 704.

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Matterson (a), *Pariente v. Plimtree* (b), *Serjeant Williams' note* (c), *Posterus v. Hanson* (d). The grievance complained of in the declaration is, that *Thomas* did not put in bail according to the exigency of the writ, but the exigency of the writ must mean either the return day or the arrest, and here there had been no arrest. The sheriff, therefore, not having been ruled, had the whole of the four months in which to make the arrest. Supposing even that he had made the arrest, and had permitted an escape, he would have had eight days during which to put in bail; therefore, even if the neglect to make the arrest is equivalent to an escape, the defendant had eight days in which either to recapture or to put in bail; the action therefore, at all events, is brought too soon. *Brown v. Jarvis* (e), differs from the present case, for there by reason of the default of the sheriff in making the arrest, special damage was incurred, which the Court thought sufficient ground for the action. And there also it was averred, that eight days had elapsed after the time when the sheriff might have made the arrest.

Bere, contra. The argument urged to-day, that the sheriff has four months in which to make the arrest, was also urged and unsuccessfully in *Brown v. Jarvis* (e). That case is identical with the present, and the dictum of Lord Abinger C.B. during the argument, that the duties of the sheriff were not altered by the late act, was abandoned in the judgment. The Court there held, "that it is the duty of the sheriff to arrest on the first opportunity he can, and if he does not do so, he is guilty of negligence." A distinction is taken, that there special damage was alleged, but the ground the Court took was, that, as damage was alleged and not denied, it must be taken that damage had accrued. So here, there is an allegation of damage, which must be taken as if it had

(a) 2 T. R. 172.

(d) 2 Saund. 59.

(b) 2 B. & P. 35.

(c) 1 M. & W. 704.

(c) 2 Wms. Saund. 61 a, n. (4).

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been proved. But it is said the plaintiff should wait eight days before he commences his action, but those eight days are to be reckoned from the time of the arrest, and here there was no arrest, therefore the argument does not apply. [Patteson J. If the sheriff had made the arrest and permitted an escape, he would have had eight days to put in bail, then how can you make it worse for him if he merely neglect to arrest?] If it is contended that it does not appear by the declaration that eight days had elapsed, it should have been pointed out on special demurrer. It is also said, that the plaintiff ought to have ruled the sheriff to return the writ, if he wished to proceed against him, but that argument also was urged in *Brown v. Jarvis* (a). So also in *Jacobs v. Humphrey* (b), the sheriff was held liable for not having sold goods under a *fi. facias* within a reasonable time before the return day, although he had not been ruled to return the writ. The old authorities are admitted, because there the exigency of the writ was to produce the body at the return day. Now it is to arrest as soon as possible. The sheriff therefore is in default, and the cause of action having once vested, the subsequent agreement is immaterial.

Cowling in reply, *Jacobs v. Humphrey* (b) is an authority for the defendant, for that was an action against the sheriff, and it was not brought till after the return day of the writ, and, *Aireton v. Davis* (c), seems to have proceeded upon the same ground. So here it is admitted that, if the plaintiff had waited till the expiration of the four months, and the defendant had then not produced the body or put in bail, he would have been liable. If the sheriff be supposed to be guilty of laches, it is always in the plaintiff's power to compel a return. As against the sheriff, the neglect to arrest must be considered equivalent to an arrest, and therefore in each case he would have eight days. [Little-

(a) 1 M. & W. 704.

(c) 9 Bing. 740.

(b) 2 C. & M. 413.

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dale J. The declaration does not aver that the writ was delivered to the defendant to be executed within four months of its issuing. *Bere.* That is admitted by the plea. Lord Denman C. J. cited *Williams v. Mostyn (a).*]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—There are many defects in this declaration. It is not stated that the writ was delivered to the sheriff within four calendar months from the issuing. That perhaps is matter of *special* demurrer only. Again, it is not stated that the sheriff was guilty of any negligence, more than eight days before the commencement of the suit. Now if the original defendant had been arrested and let go without bail or deposit, still bail above might be put in within eight days from the arrest, and no action would lie against the sheriff until after these eight days. So here, if the plaintiff means to say that the neglect to arrest when he might is, as against the sheriff, equivalent to an arrest and escape, yet if bail were put in within eight days from such negligence, it would be good. The declaration, therefore, ought to have shewn that eight days had elapsed without bail being put in before the commencement of the suit. It is indeed alleged that the original defendant did not put in bail according to the exigency of the writ, and perhaps that might be sufficient on general demurrer, which this is. Again, no damage is stated, unless some legal damage necessarily results from the neglect of the sheriff. We do not think that any such damage does necessarily result. Consistently with all that is stated in this declaration, the sheriff may, *after* a reasonable time had elapsed and *after* his negligence, have arrested the original defendant, and the plaintiff may have been able to prosecute his action and bring it on to trial quite as soon as if the sheriff had arrested on the first opportunity. We agree with the case of

(a) 7 Dowl. P. C. 38.

Brown v. Jarvis (a), that it is the duty of the sheriff to arrest the party on the first opportunity that he can, but we also agree with the Court in that case, that some actual damage must be shewn in order to make the negligence of the sheriff in that respect a cause of action, and none such is shewn on this declaration; on default made after the writ is returnable some legal damage necessarily arises, because a new writ is necessary. On this ground we think that judgment must be given for the defendant. But we have also great doubt whether it is not necessary to shew that the writ was returnable, and some default made when so returnable. Formerly the return day was fixed in the writ itself. Now it is fixed either by the fact of its being executed, or by an order of a judge, or by lapse of four calendar months. It was the duty of the sheriff under the old process to arrest the defendant on the first opportunity as much as it is now, and, though no action would lie till after the return day, because the sheriff having neglected his duty once might still repair that neglect by arresting the defendant, and having him ready at the return day, yet he ran the risk of being able to do so after once having neglected. So now, having once neglected his duty, yet, if on being called on to return the writ he chose to return *cepi corpus*, and to put in bail within eight days from that return, it may be very doubtful whether any action would lie. The sheriff ought undoubtedly to arrest as soon as possible, and so make the writ returnable as soon as possible, and return it, but, if he does not, the plaintiff has the means of making the writ returnable, and obtaining the fruit of it, by bail being put in, or if not, by an action against the sheriff. Again, it is quite consistent with all that is stated in this declaration, there being no averment of the writ being returnable, that the sheriff may have taken a deposit of the money without actually arresting, and so there may be no breach of duty at all. However, as this

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(a) 1 M. & W. 704.

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objection was taken in *Brown v. Jarvis* (a), and did not prevail, we do not decide upon any such doubt.

Judgment for the defendant (b).

(a) 1 M. & W. 704.

and mode in which a defendant

(b) See 1 & 2 Vict. c. 110, s. 3,
and the schedule as to the cases

may be now arrested on mesne
process.



Friday,
June 21st.

The QUEEN v. JOHNSON.

Under 5 & 6 Will. 4, c. 76, s. 114, the treasurer of a county may make an order upon the council of a borough, having a separate Court of Quarter Sessions, for the costs arising out of the punishment and maintenance of offenders committed for trial to the county assizes from the borough:—Held, that this clause applied to prisoners committed, in the first instance, to the borough gaol before trial, and, after trial at the assizes, committed to the county prison, in execution of their sentences, and that the council was liable, although there was no contract in force, under 5 Geo. 4, c. 85, between the county and borough justices, for the maintenance of such prisoners.

GREAVES, in Hilary term, 1838, obtained a rule to shew cause why an order made in July, 1837, by *Coleridge J.* as one of the judges of assize for the county of Hereford, and appointing a barrister to arbitrate in a dispute which had arisen between the justices for the said county and the council of the city and borough of Hereford, respecting an account made and sent by the treasurer of the county to the said council, for the costs of maintenance in the gaol of the said county of certain offenders therein named, committed from the city of Hereford for trial at the assize for the said county, from the 1st of January to the 1st of July, 1837, should not be quashed, and the award and all other proceedings had thereon be set aside.

The order of the learned judge purported to be made under and by virtue of 5 Geo. 4, c. 85 and 5 & 6 Will. 4, c. 76, s. 114, on the application of the treasurer of the said county, and, by consent of the parties, directed the arbitrator to state specially the facts as to the commitments of the said several prisoners in the said account mentioned, and as to the mode in which they were transferred from the prison for the said city or borough to the prison for the said county, and all other matters touching the same, in order that the opinion of the Court of Queen's Bench might be

Held also that the council was liable not only for the expenses of the food, clothing and punishment of such prisoners, but for a proportionate share of the general expenses of the county gaol.

taken on the same, and, further, to find the sum which ought to be paid for the maintenance of each person per week in the said county prison by the council of the said borough. The arbitrator, after reciting the said order, proceeded thus:—

Firstly, I do find that for several years before and until the 27th June, 1836, a contract had been made and existed between the justices of the peace of the city of Hereford and the justices of the peace of the county of Hereford for the support and maintenance at 5s. a head per week in the gaol or house of correction of the said county of any prisoners committed thereto from the city aforesaid, pursuant to the statute 5 *Geo.* 4, c. 85, intituled “An Act for amending an Act of the last Session of Parliament relating to the Building, Repairing, and Enlarging of certain Gaols and Houses of Correction, and for procuring Information as to the state of all other Gaols and Houses of Correction in England and Wales,” which contract was put an end to on the said 27th June, 1836, and during that period and from thenceforward until the passing of the statute 5 & 6 *Will.* 4, c. 76, intituled “An Act to provide for the Municipal Corporations in England and Wales,” prisoners intended to be tried at the assizes have been, in the first instance, committed to the city prison, and at the assizes have been taken into the shire hall, and there, as soon as a bill against them was found, delivered by the gaoler of the city prison to the gaoler of the county prison, and in case of conviction they have invariably been committed to the county prison or house of correction. The same practice has been pursued with regard to the prisoners touching whom the present question arises. These prisoners were severally committed to the city prison for trial at the assizes for the county, and after conviction were committed, in execution of their sentences, to the county prison, and the charges in question are in respect of their imprisonment therein under the circumstances above stated. Those charges are made upon a calculation of the proportion

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which the expense of each prisoner bears to the total expenses of the gaol on the average of one year, as set forth in the paper marked "A." annexed to this my award, and it being agreed by the parties that the order of the treasurer marked "B.," hereunto annexed, shall have the same effect as if it were an order for the costs of the maintenance and punishment of the prisoners, and not of their maintenance only; I do find and award, that, if the council of the city or borough of Hereford are by law liable in respect of prisoners committed to the county gaol in manner hereinbefore stated; and if it is considered that the said council are liable for the proportion of each of such prisoners to the general expenses of the gaol, then that the sum of 9s. a week for each of such persons ought to be paid by the said council to the treasurer of the said county, but if it is considered that the said council are liable only for the personal expenses of such prisoners, that is, in respect of their clothing, such wear and tear of furniture, punishment, and such other expenses as are a charge upon the gaol directly and solely occasioned by their imprisonment therein, then I find and award, that the said council ought to pay to the said treasurer the sum of 5s. a week for each of such prisoners." (a)

(a) The 5 Geo. 4, c. 85, s. 1, enacts, "That it shall be lawful for the justices of the peace, or any two of them, or for other persons having the government or ordering of any gaol or house of correction in any city, town, borough, port or liberty, to contract with the justices of the peace having authority or jurisdiction in and over any gaol or house of correction of the county, riding or division, wherein or whereto such city, town, borough, port, or liberty is situate or adjacent, or with any two of them, for the support and maintenance in such last-mentioned gaol or house of correction, of

any prisoners committed thereto, from such city, town, borough, port or liberty, provided that no such contract be entered into by any justices of the peace of any county, riding or division, without an order for that purpose being made at some general or quarter sessions, or gaol sessions, having jurisdiction in that behalf, nor by the justices or other persons having the government of the prison of any such city, town, borough, port or liberty, without an order for that purpose being made at sessions thereof; and every such contract may either be perpetual or limited to a certain term

The paper marked "A.," and referred to in the award, was headed, "A Statement of Expenses of the Hereford County

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years, as the parties shall mutually agree; and, during the existence of such contract, every prisoner who would otherwise be confined in the gaol or house of correction of the city, town, borough, port or liberty so contracting, may be lawfully committed or removed to and confined in the gaol or house of correction so receiving him or her under such contract; and all prisoners, so confined by contract, whether before or after trial, shall be subject in all matters and things to the same rules and regulations, as if they were committed thereto by any of the justices of the county, riding or division; and, if committed before trial, shall be triable and tried in the same manner as if their offences had been committed in a part of the county, riding or division not within the city, town, borough, port or liberty from whence such prisoners shall come; save only that, if the gaol or house of correction so receiving under a contract a prisoner committed for trial, shall be situate within two miles of the usual place of trial of the city, town, borough, port or liberty, wherein the offence charged against such prisoner shall be alleged to have been committed, it shall be lawful to try such prisoner in the manner heretofore accustomed, and for the magistrate, or other proper officer, of such city, town, borough, port or liberty, to direct the removal of such prisoner for trial, and to do all other acts necessary for such trial or consequent thereon."

Sect. 2 enacts, "That the monies to be paid under any such contract as aforesaid shall be raised in the same manner as monies for defraying the expenses of the gaol or house of correction for which a substitute shall be provided under such contract; and where such expenses are not wholly defrayed from the same fund, and there shall arise a difference of opinion between the parties interested in the several funds applicable to the several purposes of the prison, as to the proportion in which those funds respectively shall contribute to the sum to be paid to the county, riding, or division, for the use of its prison, and such difference shall not be adjusted by agreement between themselves, it shall be lawful for either of such parties to apply to the justices of assize of the last preceding circuit, or the next succeeding circuit, or to one of such justices, who shall, by writing under their or his hands or hand, nominate a barrister at law, not having any interest in the question, to arbitrate between the parties; and such arbitrator may, if he shall see fit, adjourn the hearing from time to time, and require all such further information to be afforded by either of the parties, as shall appear to him meet and necessary; and shall by his award, in writing, determine the proportions in which such parties shall contribute towards the said expenses; and his award shall be final and conclusive between the parties; and such

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Gaol, from Easter 1836 to Easter 1837," and consisted of items for the maintenance of the prisoners, and the general repairs and management of the gaol.

Sir *W. W. Follett* and *R. V. Richards* shewed cause (a), and contended that the judge had power to make the order of reference under 5 & 6 *Will. 4*, c. 76, s. 114 (b), although

arbitrator shall also assess the costs of the arbitration, and shall direct by whom and out of what fund the same shall be paid."

(a) In Michaelmas term last (Nov. 14th), before Lord *Denman* C.J., *Patteson*, *Williams* and *Cole-ridge* Js.

(b) The 5 & 6 *Will. 4*, c. 76, s. 114, enacts, "that the treasurer of every county in England and Wales shall keep an account of all costs arising out of the prosecution, maintenance and punishment, conveyance and transport of all offenders committed for trial to the assises in such county, from any borough in which a separate Court of Quarter Sessions of the peace shall be holden; and the treasurer of every such county shall, not more than twice in every year, send a copy of the said account to the council of each of the said boroughs, and shall make an order for payment of the same on the council of such borough; and the council of every such borough shall forthwith order the same, with all reasonable charges of making and sending such account, to be paid to the treasurer of such county out of the borough fund; and in case any difference shall arise concerning the said account, it shall be decided by the arbitration of a barrister, to be named as is provided

in the case of differences with respect to the payment of monies under contracts made by authority of an act made in the fifth year of his late majesty King George the Fourth, intituled, 'An Act for amending an Act of the last Session of Parliament, relating to the Building, Repairing and Enlarging of certain Gaols and Houses of Correction, and for procuring Information as to the State of all other Gaols and Houses of Correction in England and Wales:' Provided that nothing herein contained shall be construed to alter or restrain the powers given by the last-mentioned act, of contracting with the justices of the peace, having authority or jurisdiction in and over any gaol or house of correction of the county wherein or where such borough is situate, or whereto it is adjacent, for the conveyance, support and maintenance in such last-mentioned gaol or house of correction of prisoners committed thereto from such borough, save only that all such powers shall, after the 1st day of May, 1836, be vested in the council of such borough, in the name of the body corporate whose council they are, and in none other; and, for the purpose of making such contracts as aforesaid, the council of such borough, and none other, shall

there was no contract in force between the county and borough justices under 5 Geo. 4, c. 85, and cited *Rex v. Clarke*(a), *Rex v. Shepherd*(b), and *Mercer v. Davis*(c); and that, as the borough derived benefit from the gaol generally, it was bound to contribute to its general expenses.

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Maule and Greaves, contra. The 5 & 6 Will. 4, c. 76, s. 114, applies only where prisoners are committed for trial from the borough to the county gaol, and they cannot be so committed unless there is a contract under 5 Geo. 4, c. 85. The former statute speaks of prisoners "committed or removed," and the latter word would apply to prisoners committed to the borough gaol for trial, and removed after trial to the county gaol: but the recent statute uses the word "committed" only, that is, committed for trial to the county gaol. The prisoners in this case were, in fact, committed to the borough gaol, and not removed to the county gaol until after trial. They then referred to 6 & 7 Will. 4, c. 105, ss. 1 & 2, and on the second point contended that those expenses only should be charged to the borough, which would have been saved if the borough prisoners had not been maintained in the gaol, and cited *Rex v. Kingston-upon-Hull*(d).

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court, and (after stating the facts of the case) proceeded thus:—The question is, whether the above mentioned order be valid in point of law, having been made under the authority of 5 & 6 Will. 4, c. 76. Now by the 114th section of that statute, it is enacted "that the treasurer of every county shall keep an account of all costs arising out of the

have power to make the orders required by the said last-mentioned act to be made by the justices of the borough at the borough sessions."

(a) 5 B. & Ald. 665; S. C. 1 D. & R. 316.

(b) 2 A. & E. 298; S. C. 4 N. & M. 185.

(c) 10 B. & C. 617.

(d) 1 A. & E. 880, n.

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prosecution, maintenance and punishment, conveyance and transport, of all offenders *committed for trial to the assizes in such county*, from any borough in which a separate Court of Quarter Sessions shall be holden (which is the case with respect to the said city or borough of Hereford), and the treasurer of every such county shall send a copy of such account to the council of each of such boroughs;" then follows a provision of the nature described in the said order, under and by virtue of the 5 Geo. 4, c. 85, which is incorporated with the first mentioned act, in the event of such difference as is in the said order also recited, and which had actually taken place. Then follows a provision that the power of contracting by borough justices with county justices for care and maintenance of borough prisoners, under this said act, 5 Geo. 4, c. 85, shall remain in force. It was contended against the jurisdiction to make the said order, that, inasmuch as generally the justices of the borough have no power of committing to the county gaol, and further, as it appears from the said award that a contract between the borough and county justices for the care and maintenance of borough prisoners no longer exists, the treasurer had no right to make the claim from which these proceedings originate. We, however, think that there is no inconsistency in the provisions of the two statutes, and that, if no contract be made or in force under 5 Geo. 4, c. 85, the power given to the treasurer of the county under the said 114th section of 5 & 6 Will. 4, c. 76, may well be exercised. It is observable also that the objection, which we are noticing, seemed to assume that the said statute was applicable only to cases where borough prisoners are committed for trial to *a county gaol*, whereas the language is "committed for trial to the assizes," and we think that, without any violent or forced construction, we may consider prisoners, who (according to the statement in the award) "have first been committed to the city prison and thence taken for trial to the shire-hall of the county and in case of conviction have invariably been committed to the county prison or house of correction," as falli

within this description. We are of opinion, therefore, that the learned judge did possess jurisdiction, and that his order was properly made accordingly.

We are not sure whether in the course of the discussion any objection was made to the order, except that which we have already noticed and disposed of. We think, however, that the larger amount of weekly charge for each prisoner, "being made upon a calculation of the proportion which the expense of each prisoner bears to the whole expenses of the gaol," is reasonably made, and ought to be paid, seeing that the borough has a proportionable share of the benefits arising from the whole establishment. The consequence is that the rule must be discharged.

Rule discharged.



The QUEEN v. WATKINSON (*a*).

QUO warranto information against the defendant for acting as chief constable of the division or wapentake of Staincliffe with Ewcross, in the West Riding of Yorkshire.

Plea: that, on the 2d May, 1832, the office of one of the chief constables of and for the said division or wapentake was vacant by the death of one *Wm. Carr*, and it being necessary, for the due and proper rule and government of the said division, that some other fit person should be appointed to fill up the said vacancy, and no appointment of any person having been made at any tourn or court leet, thereupon on the day and year last aforesaid, at the general quarter sessions of the peace, holden at Pontefract in and for the said West Riding, before &c., the said justices then and there at the said general quarter sessions in Court duly assembled, did appoint the defendant chief constable of the said division, in the place of the said *Wm. Carr*. **Averment,** that the defendant was sworn in and admitted, and took upon himself the execution of the office.

The appointment to the office of high constable of a county lies in the justices at large, and may be exercised by the justices at quarter sessions, (where all the justices have the opportunity of being present and voting,) but not at petty sessions.

(*a*) This case was decided during term, May 24th.

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Replication: 1st. that the justices at the said quarter sessions did not duly appoint the defendant; 2d. that the defendant was not duly admitted; 3d. that on the 29th August, 1831, and long before the holding of the quarter sessions at Pontefract aforesaid, at a special sessions of justices, acting within the said division or wapentake, duly called and holden at Settle, within the said division, for the purpose of appointing a person to the office of chief constable so vacant as aforesaid, one *C. Edmondson* was by the said justices, at the said special sessions assembled, duly appointed chief constable in the place of the said *Wm. Carr*, and that the said *C. Edmondson* did duly appear at the ensuing general quarter sessions, held at Knaresborough, in and for the said West Riding, on the 18th October, in the year aforesaid, before &c., and then tendered himself to be sworn in and admitted, but the said justices refused so to do, and respited the further hearing of the application to the next quarter sessions to be holden at Pontefract. Averment, that at the Pontefract quarter sessions the justices wrongfully refused to swear in *Edmondson*. The 4th and 5th replications raised the same question.

The rejoinder joined issue on the 1st and 2d replications, and traversed the remainder.

At the trial before *Tindal C. J.*, at the York summer assizes, 1835, the facts stated in the plea and 3d replication were respectively proved, and the verdict passed for the crown, subject to a special case; the Court to direct how the verdict should be entered.

The case was argued in Michaelmas term last (a).

Starkie for the crown. The question in this case is, whether the election of a high constable may be made by the justices of the hundred out of sessions, or whether it should be made at quarter sessions. It is agreed that the right of election exists in the justices at large, and this must be either in virtue of an original authority, or in consequence

(a) Nov. 10th and 14th, before Lord *Denman C. J.*, *Patteson*, *Williams* and *Coleridge Js.*

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of powers devolved upon them from the disuse of the sheriff's tourn, where it would seem the high constable was formerly elected. If the election is made by an original authority that justices or conservators of the peace possessed, it is clear that the quarter sessions have nothing to do with the matter, for constables are mentioned in the statute of Winton (13 *Edw.* 1, st. 2, c. 6), and it is not till many years after that quarter sessions were instituted by 36 *Edw.* 3, st. 2, c. 12, and 12 *Ric.* 2, c. 10. The first statute appointing justices of the peace in place of the ancient conservators, was 1 *Edw.* 3, st. 2, c. 16, which was followed by 4 *Edw.* 3, c. 2, 18 *Edw.* 3, st. 2, c. 2, and 34 *Edw.* 3, c. 1, but none of these statutes regulate or require any meetings in sessions. And it is laid down by *Lambard*, b. 4, c. 2, p. 380, and *Com. Dig.* Justices of Peace, (D 3), that if a number of justices meet together they may hold a session, although not summoned by precept, and also that any two justices might issue a precept for a sessions, which no other justices could supersede. It is clear therefore that, until the 36 *Edw.* 3, st. 2, c. 12, and 12 *Ric.* 2, c. 10, there could be no elections at quarter sessions. It is suggested by *Holt C. J.* in *Rex v. Hewson* (a), that the appointment of constable was formerly exercised by the conservators of the peace, which was probably the case, as there can be no doubt that the high constable, like the petty constable, is an officer at common law. It is true, in the 4 *Inst.* 267, and 2 *Hale P. C.* 96, the origin of the office is attributed to the statute of Winton, and *Sharrock v. Hannemer* (b) is an authority to that effect, but other authorities shew that the high and petty constable have equal powers, and both derive them from the common law; *Fitzh. Just.* fo. 222 b, *Crompt. Just.* fo. 145 b, *Regina v. Wyatt* (c), *Regina v. Jennings* (d), *Com. Dig.* Leet (M 5); and in *Ritson's Office of Constable*, p. 13 (2d ed.), a writ is preserved of the 36 *Hen.* 3, by which it is provided, "that in every hundred there should be constituted a chief constable, at whose mandate all those

(a) 12 *Mod.* 180.(b) *Cro. Eliz.* 375.(c) 2 *Ld. Raym.* 1189.(d) 11 *Mod.* 215.

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of his hundred sworn to arms, should assemble and be observant to him for the doing of those things which belong to the conservation of the king's peace." The statute of Winton, therefore, which mentions high constables, only made certain alterations in their duties, and required two constables to be elected in each hundred, where there was probably only one before. If the authority to elect did exist in the ancient conservators, by whom it was probably exercised at the tourn, the duty must have fallen upon the justices at large when the tourn came into disuse. The court leet, which was derived out of the tourn, is still in existence, but, if that court also fell into desuetude, any duties to be performed there would have to be exercised by the justices. In the *Case of the Constables of Limington* (a), it was held that the sessions had nothing to do with the election of constables chosen at the leet. So also in the *Case of the Constable of Stepney* (b), Williams J. said, that justices of the peace were to elect high constables, but that where a petty constable was chosen at the leet, justices of the peace had nothing to do with it; but in the *Case of the Village of Chorley* (c), where there was no leet, the Court held that the justices had jurisdiction to appoint a constable at common law, and in *Rex v. Hewson* (d), which is the same case, Holt C. J. said if there be no leet at all, then you must go to the sheriff's tourn: and he supposed there might be some lost statute giving the election to justices in such case. The justices are required by their commission to execute all the ordinances for the surety of the peace, and, as by the statute of Winton two constables were to be chosen for hundreds for certain purposes, the election would necessarily fall upon the justices. The 34 & 35 Hen. 8, c. 26, which is the act establishing common law judicature in Wales, is a statutory confirmation of the right of election being in the justices at large, for the object of

(a) 2 Str. 798.

(b) 1 Bulst. 174.

(c) 1 Salk. 175; S. C. 3 Salk. 98, as *Charley Parish's* case.

(d) 12 Mod. 180.

that statute was to assimilate the law in Wales to that of England, and section 70 enacts that the justices of the peace, or two of them at the least, shall appoint two high constables in every hundred, and clearly does not require that the appointment should be made at quarter sessions.

Dalton also, p. 46, seems to consider that any one justice may appoint high constables, and adds that the usual practice was either to appoint them at quarter sessions, "or, if out of sessions," by the greater number of the justices of the division. The high constable being the immediate officer of the justices of the division, it is fitting that they should have the appointment.

Wortley contra. It is not disputed that the high constable is an officer at common law, but the question is, whether the justices meeting in petty sessions are entitled to elect the high constable, independently of and contrary to the wishes of the justices in quarter sessions. The argument that the election cannot be in the justices at quarter sessions, because quarter sessions are of comparatively recent institution, equally applies to any election whatever by justices, as the office of high constable is much more ancient than that of justice. It is probable that the election has fallen upon the justices in one of the modes suggested, either from a lost statute or by devolution of the ancient powers of conservators of the peace. The sheriff's tourn and the county court were the two courts by which counties were formerly governed, as appears by *Fineux J.*, 12 *Hen.* 8, fo. 18. He traces the mode in which the leet was derived out of the tourn, and shews that it was held only for each hundred, whereas the tourn, like the general sessions, was held for the county at large. The tourn also, like the sessions, was a court of oyer and terminer, 2 *Hawk.* P. C. b. 2, c. 2, 4 *Inst.* 260, whereas the hundred court, like the petty sessions, is not, *ib.*, 4 *Inst.* 265. If then, as stated by several old authorities, 4 *Inst.* 265, the election of high constables was made at the tourn, the inference is very strong that the

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power has devolved on the justices at large in general sessions, which means the same as quarter sessions, *Lambard*, b. 4, c. 19, p. 593, and which have absorbed all the powers of the ancient tourn. Wherever sessions are mentioned by the old statutes, the general congregation of justices is intended, as in 12 Ric. 2, c. 10, and 14 Ric. 2, c. 11, and no trace appears of the existence of petty sessions till very modern times, where powers have been given to them by special statutes. *Lambard*, it is true, refers to special sessions (a), but those also consisted of the justices at large, and were called special because they were not held at the usual times, but were assembled for some special business. In b. 4, c. 1, p. 378, he defines a session to be any assembly of justices (one of them being of the quorum) on a certain day appointed, to hear and determine according to their powers. Special sessions are to this day constantly holden in different counties of the kind referred to. The origin of petty sessions is to be found in much later times, and proceeded from the reluctance of the legislature to give increased powers to one justice acting alone, and it was therefore directed that such powers should be exercised jointly with another justice. It is true that *Dalton*, 46, speaks of the election of the high constable by the justices of the division, and refers to *Lambard*, b. 2, c. 6, p. 186, as laying down that a single justice may cause two constables to be elected. But *Lambard* only says that one justice may put the statute of Winton in execution "by seeing that two constables be chosen in each hundred," which is ambiguous, and may mean that it was part of each justice's duty to see that an election was made in general sessions. The term "justices of a division," as mentioned by *Dalton*, has no legal signification. "Division" does not, like "franchise," describe any legal portion of territory. It is true that the 33 Hen. 8, c. 10, directed that the justices of each county should divide themselves into hundreds, &c. and hold one session in each quarter besides the quarter sessions, but that act was repealed by

(a) Lamb. b. 4, c. 20, p. 623.

the 37 *Hen.* 8, c. 7, and no act has since constituted any divisions of counties. Many subsequent statutes have indeed spoken of divisions of counties, yet, as observed by *Dr. Burn*, "there is no law at present which requires justices to divide" (*a*), and in *Rex v. Price* (*b*), where the defendant had convicted a woman of selling ale without a licence, whereas she had a license by two justices, who both lived out of the division, the Court held that any justice of the county, though not acting for the division, might grant the license. So in *Evans v. Stevens* (*c*), where the question was raised whether each division of the county of Sussex could appoint a treasurer, the Court held that the term "division of a county," in 22 *Geo.* 3, c. 41, did not mean "the district of a county" popularly so termed, but a legal division, like those of Lincolnshire, and the legal existence of what are usually called divisions was doubted. The 9 *Geo.* 4, c. 43, which provides for the divisions of counties, amended by 10 *Geo.* 4, c. 46, shews that the modern act, enabling counties to be divided, did not contemplate that the divisions should be coextensive with the different hundreds or wapentakes, for the latter of these statutes provides for the case of a hundred being divided between two divisions of a county, and the inconvenience thereby caused is remedied. If it is true, as *Dalton* suggests, that justices out of sessions may elect the high constable, why is it that the swearing in which is so essential to the office being filled, *Rex v. Whitchurch* (*d*), *Rex v. Hearle* (*e*), must be at the quarter sessions? There are several authorities which lay down that the high constable should be chosen by the justices at quarter sessions; *Bac. Office of Constable* (*f*), *Sheppard's Office of Constable*, &c. c. 7, s. 2; 1 *Black. Comm.* 355; *Com. Dig. Leet*, (M 5). In the latter book it is laid down that the quarter sessions may remove as well

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(*a*) 4 *Burn's J.* by D'Oyley & W.
16. And see *Rex v. Justices of
Devon*, 1 B. & Ald. 588.

(*b*) *Cald.* 305, n.

(*c*) 4 T. R. 224—459.

(*d*) 7 B. & C. 573; S. C. 1
Mann. & R. 472.

(*e*) 1 Str. 625.

(*f*) *Law Tracts*, 181.

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as appoint a high constable, for which *Reg. v. White* (a) is cited, and 1 *Bulst.* 174. In a precedent of an indictment for not serving the office of high constable, in *Cro. Cir. Comp.* 165 (9th ed.), it is averred that he was elected by the justices at quarter sessions. The statutes cited all make for the right of election in the justices at large. For although sect. 70 of 34 & 35 *Hen.* 8 enacts that two justices shall appoint the high constables, yet, as by that statute (s. 55) there were to be no more than eight justices in each county (as in other parts of England), and one of the two justices to make the appointment was to be of the quorum, it was evidently intended that the election should be made at sessions. The 13 & 14 *Car.* 2, c. 12, s. 15, which gives the appointment of petty constables to the justices at sessions in default of an appointment at the leet, is passed over by the other side as not applicable, yet the analogy is very striking. So also the 10 *Geo.* 4, c. xcvi. (local and personal), enables the justices of Cheshire in quarter sessions to appoint high constables, as if in imitation of the law and usage in other counties. As to the argument *ab inconvenienti* it is fitting that the election should be by the whole body of justices, for he is the officer of the justices at large, and not of the hundred.

It is not denied that the defendant was properly admitted, — unless the previous admission of *Edmondson* at petty sessions was good. But, though *Edmondson* applied to be sworn in, — he was refused; the office therefore was not full *de facto*. An analogy on this point is furnished by cases in which it has been considered whether an assize would lie; *Cragg v. Norfolk* (b), *Com. Dig.* title *Seisin*, *Rex v. Whitwell* (c), and *Tufton v. Nevinston* (d). He also referred to *Rex v. Ellis* (e), where Lord *Hardwicke* C. J. said, “The title to every office is grounded on two things, the election and his being sworn into the office,” and to *Rex v. Ponsonby* (f), to shew that *Edmonson* was not in office *de jure*.

(a) 1 *Salk.* 150.

(b) 2 *Lev.* 108.

(c) 5 *T. R.* 85.

(d) 2 *Ld. Raym.* 1354.

(e) 9 *East*, 252, n.

(f) *Sayer*, 245.

Starkie in reply. There is no issue to raise the point last taken. If the matter were *res integra*, it would seem to be more convenient that the election should take place within the hundred than that it should be delayed till the quarter sessions. On behalf of the crown it is not denied that the election may take place at the quarter sessions, but it is contended that an election at the petty sessions is also good. It appears from *Lambard*, 2 b. c. 6, p. 186, that a single justice may appoint. *Rex v. Corfe Mullen* (a) shews that a person may be in such an office as that of constable although he has not been sworn.

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LORD DENMAN C. J. now delivered the judgment of the Court.—The defendant having in due form of law been elected, admitted and sworn, at the general quarter sessions, into the office of one of the chief constables of the wapentake of Staincliffe, in the West Riding, the question is, whether at the time of his election the office was not already full, a person of the name of *Edmondson* having been previously elected and appointed into the office on the same vacancy, at a petty sessions of the justices of the peace, usually acting for the same wapentake, holden for that declared purpose.

The right of appointing is admitted on all hands to be in the general body of the justices of the peace since the non user of the sheriff's tourn. But it was argued for the crown that the right may be exercised even by any single justice of the peace, and, at all events, by the regular meeting held at a petty sessions, by those who usually act in that portion of the Riding.

The argument for the defendant was not directed against this doctrine, when applied to the right of dealing with offenders and of acting in the ordinary exercise of the jurisdiction of a justice of the peace. But a difference was taken between such proceedings and matters of election and

(a) 1 B. & Ad. 211.

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appointment, which, being vested in the whole body, necessarily and of their own nature import that the whole body must have the opportunity of voting in the election of their officer, that they must therefore be convened for that purpose. Manifestly this cannot be done by the justices of the peace of a single wapentake agreeing among themselves to meet and make the election. No particular method of summoning is prescribed by law; but any method which secures full notice and allows all to exercise their judgment will suffice. Now this may well be done, and we are of opinion that it has been done in favour of this defendant at the general sessions, and that it was not well done at the petty sessions for the wapentake. It follows that the election of the defendant was good, and that he is entitled to our judgment.

Judgment for the defendant.

EVANS v. REES (a).

1. In an action which turned on a question as to the boundary of two manors, a verdict was taken for the plaintiff, subject to the

REPLEVIN for taking and detaining the plaintiff's cattle in the parish of Ystrad Gunllais, in the county of Brecon, in a close called the Drym Common.


Avowry: that the defendant was occupier of a certain

(a) Decided on the last day of Easter term last. A nolle prosequi had been entered as to another defendant, *Lewis*.

award of an arbitrator, who was to determine for which party the verdict was to be finally entered, and to set out the boundaries. He directed the verdict to be entered for the defendant. In a subsequent action by the defendant against a third party, where also the question substantially was as to the boundary of the same manor, the verdict was received, but the award rejected, as evidence of reputation.

2. An ancient presentment by the homage of a manor, in the form of a book, set out the boundaries of the manor, and then gave in alphabetical order the names of the several parishes within it, and of the tenants resident in each parish, but this part of the presentment contained nothing as to boundaries. Two or three sheets at the concluding part of it, where the parish of Y. should have followed in order, had been cut off, but it did not appear under what circumstances. In an action involving a question as to the boundary of the manor, where it was admitted that the manor and Y. were conterminous in the direction of the locus in quo, the presentment was admitted in evidence of the reputed boundary, as the document, although mutilated, was perfect in that part of it which related to the subject of the boundary.

messuage &c., in the said parish, and that he and all occupiers &c., for thirty years next before &c., and before the said time when &c., without interruption &c. (claiming a right of common in the locus in quo), and that the cattle were distrained damage feasant. Verification.

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Plea in bar: that a little before the time when &c., the cattle were depasturing on a certain other part of the Drym Common, situate in the parish of Cadoxton, in the county of Glamorgan; that the defendant, a little before the time when &c., whilst the cattle were so depasturing, wrongfully and without leave of the plaintiff drove them off the last-mentioned part of the common upon the said part of the common in the county of Brecon and parish of Ystrad Gunllais, being the place in which &c., and when the same were so driven they unavoidably destroyed the grass and did damage there, which are the same destroying &c. Whereupon the defendant wrongfully took the cattle in the said last-mentioned part of the Drym Common, being the locus in quo &c. Verification.

Replication: that the cattle at the said time when &c., wrongfully and without the cause alleged were destroying &c., without this, that the defendant drove them from the said part of the common to the said other part of the common. Conclusion to the country and issue thereon.

At the trial before *Coleridge J.*, at the Brecon summer assizes, 1838, the whole contest was, whether the place in the Drym Common, where the plaintiff's cattle were depasturing when they were seized, was in the parish of Cadoxton, in Glamorganshire, which was the case for the plaintiff, or in Ystrad Gunllais, which was the case for the defendant, and involved an issue as to the boundary line of the two counties, as well as of the manors of Neath Ultra and Killy Bebill, on the one hand, and of the manor of Brecon on the other. It was admitted that, wheresoever the boundary line was to be drawn in this direction, the boundaries of the counties, parishes and manors, on either side were, at all events, conterminous on this part of the

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common. At the Hereford summer assizes, 1834, an action on the case came on for trial, at the suit of one *Gething*, against the present plaintiff, for disturbance of *Gething's* common by digging a ditch. The plea was not guilty, and the question raised by the pleadings in that action was similar to the question in the present, viz. whether the ditch, which was cut on the same Drym Common, was in the county of Brecon or of Glamorgan. A verdict was taken for the plaintiff by consent, and the action was referred by order of *Nisi Prius*, which empowered the arbitrator to enter the verdict ultimately as he should think fit, to fix the boundaries and to order stones to be put down for the purpose of defining such boundaries. The arbitrator awarded that the verdict should be entered for the defendant (the present plaintiff), and also directed in what manner the boundaries were to be marked out. For the plaintiff, after it had been shewn what the substantial question was in the former action, an examined copy of the record was produced as evidence of reputation as to the boundaries of the manors; and the award and order of reference were then produced for the same purpose, and also as explanatory of the verdict. The learned judge allowed the record to be given in evidence, but excluded the order of reference and award. On the part of the defendant a presentment made in 1666, by the homage of the manor of Brecon, was produced from Brecon Castle. It was in the form of a book, and consisted of several sheets; it commenced with an account of the manor court of Brecon, and then set out the boundaries of the manor, which comprehends *Ystrad Gunllais* and many other parishes; it then gave, alphabetically, the names of the above parishes, with the names of the tenants of the manor in each parish, and the rents paid by them respectively; but nothing appeared in this part of the book relative to the subject of boundaries. Two or three sheets of the concluding part of the presentment, in which the parish of *Ystrad Gunllais* should have appeared, according to the order of alphabetical arrangement, had been cut o

but under what circumstances did not appear. The reception of this document was objected to on the ground that it had been mutilated, and that in the part of it that was not forthcoming there might have been some memorandum inconsistent with the statement of boundaries in the previous part of it, and hostile to the defendant's case—as, for instance, that some of the tenants who might be set down as resident in the parish of Ystrad Gunllais, denied that they were tenants of the manor of Brecon. The learned judge overruled the objection, and the verdict passed for the defendant.

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J. Evans, in the Easter term following (*a*), moved for a new trial, on the ground that the award and reference had been improperly excluded, and the presentment improperly admitted (*b*).

The award was admissible in evidence. It cannot be denied that, on a question as to any public right, a verdict, though not between the same parties, is evidence of reputation. The record was received, and the award should have been received also, for it was part of the record, and the act of the arbitrator in directing the verdict was equivalent to the finding of the jury; *Lee v. Lingard* (*c*), and per *Le Blanc J.* in *Bonner v. Charlton* (*d*). The award, in addition to the evidence already given for that purpose, would have shewn that the question in the former action was the same as in the present, and that the locus in quo had been adjudged to be in Cadoxton: the award was, in fact, a special verdict, which is evidence of reputation; *Bull. N. P.* 233. In *Laybourn v. Crisp* (*e*), where it was held that a decree of a court of equity, in a cause between third parties, was

(*a*) April 22, before Lord *Denman C. J.*, *Littledale*, *Patteson* and *Coleridge Js.*

(*b*) He moved also, on the ground that the jury had been misdirected, and that their verdict

was against evidence, but neither of the latter points is material to notice.

(*c*) 1 East, 401.

(*d*) 5 East, 139.

(*e*) 4 M. & W. 320.

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evidence concerning a public right, Lord Abinger C. B. observes, "Where a record is produced to prove a custom, and there is no direct issue on the custom, the constant practice is to give some evidence to shew that the custom was really in question;" this award would have shewn what the question was in the prior action. [Coleridge J. The evidence of the witnesses would also make the former verdict intelligible; would it therefore be receivable? The tender of the award in evidence was like tendering the evidence of witnesses; the award, it is said, would have shewn the boundary line, but that line was only evidence of the right to dig the trench for which the former action was brought.] That action was referred for the very purpose of setting out the boundaries, and it would be of little use for the arbitrator to set them out unless his award might be used in evidence. [Littledale J. In *Reed v. Jackson* (a), Lawrence J. puts it thus, "Reputation would have been evidence as to the right of way in this case; à fortiori therefore the finding of twelve men upon their oaths." This award is merely what the arbitrator makes the jury say.] 'The jury seldom do know anything themselves of the facts; they come to their conclusion from the evidence of others; and so does the arbitrator. [Coleridge J. In *Rogers v. Wood* (b) a document, purporting to be a decree of the Lord High Treasurer, Chancellor of the Exchequer, the Attorney and Solicitor General, and others, was held to be inadmissible as evidence of reputation, because they did not form any court known to the laws of this country, and had no knowledge of their own on the subject of the decision.]

It was then contended that the presentment was inadmissible on the ground taken at the trial.

Cur. adv. vu

(a) 1 East, 355.

(b) 2 B. & Ad. 245. See *Evans*

v. Taylor, 3 N. & P. 17
Brisco v. Lomax, ib. 308.

LORD DENMAN C. J., on the last day of Easter term, delivered the judgment of the Court.—This was an action of replevin, and the question on which it turned was, what is the true boundary of the counties of Glamorgan and Brecon near the spot where the plaintiff's cattle were distrained. The verdict was for the defendant. On a motion for a new trial, three grounds were stated by the counsel for the plaintiff, on which the Court took time to consider; another ground, as to misdirection, having been disposed of upon the argument. The grounds were, first, that an award tendered by him in evidence was rejected by the learned judge. The award was made very recently, in an action on the case, brought by a person alleging himself to be a commoner, for digging a ditch, which the present plaintiff asserts to be the true boundary, and so disturbing the right of common. The plea in that case was not guilty, and the cause was referred at nisi prius, with power to the arbitrator to set out the boundary, which should be proved before him, and to direct which way the verdict should be finally entered. He directed a verdict to stand for the plaintiff (a), and set out the boundary, as he conceived it to be proved, by his award. That award, not being made between the same parties as those in the present action, could not be used as binding upon them, but was offered as evidence of reputation, the boundary being a matter of general and public interest. The cases of *Reed v. Jackson* (b) and *Laybourn v. Crisp* (c), and others, were cited to shew that a verdict on such matters, although between strangers to the parties on the record, is evidence of reputation; and it was contended that the award in this case was to be considered as part of the verdict, and admissible on the same grounds. We cannot agree to this view of the case. The authority of an arbitrator is entirely derived from the consent of the parties to the reference: his award has no force except by reason of that consent; and no instance can be found in

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(a) The plaintiff in this action. (c) 4 M. & W. 320.

(b) 1 East, 355.

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which strangers have been held to be in any way affected in their rights by an award, either as evidence of right or of reputation. The award is but the opinion of the arbitrator, formed not upon his own knowledge, as declarations used by way of reputation commonly are, but upon the result of evidence laid before him, most probably in private, and formed also post litem motam, having none of the qualities upon which evidence of reputation rests. It may be said that the verdict of a jury is equally defective in such qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but that the principle of those authorities is not clear enough to embrace an award. We are therefore of opinion that the learned judge was perfectly right in rejecting the award.

The second ground was, that a presentment found in the castle of Brecon was admitted in evidence, although a considerable portion of the parchment on which it was written had been cut off, and it was supposed that the part cut off might have contained something adverse to the interests of the party producing it. We are of opinion that no sufficient ground is laid for supposing anything of the sort, and, inasmuch as that part of the presentment which related to the boundary in question was in itself perfect, we cannot see any reason for rejecting this document, and think that it was properly admitted. [His lordship then disposed of the motion on the ground that the verdict was against evidence.] The rule for a new trial must therefore be refused.

Rule refused.



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*Saturday,
June 22nd.*

BARRY v. ARNAUD.

SPECIAL Case. This was an action on the case, brought by a merchant of London against the defendant, who was the collector of his late Majesty's customs, and employed in the duty of collector by the order and with the concurrence of the commissioners of his late Majesty's customs for the port of Liverpool, for refusing on the 6th of August, 1836, to accept from the plaintiff the sum of 144*l.* 12*s.* 8*d.*, the same then being (as the plaintiff alleged) the full amount of the customs duty then payable upon the delivery for home consumption of certain foreign goods, to wit, 38,569*lbs.* weight of unmanufactured tobacco, then being the property of the plaintiff, which had before then been brought or come into the United Kingdom, and were then deposited in certain warehouses at Liverpool, and for refusing to sign a bill of entry of the said tobacco upon the due payment of the said sum, whereby the plaintiff was prevented from obtaining the delivery of the said tobacco from the said warehouse, and from selling and disposing thereof to great advantage. The defendant having pleaded not guilty, and issue having been joined thereon, the parties

By 3 & 4 *W.* 4, c. 51, s. 2, her Majesty may appoint commissioners for managing and collecting the customs; by s. 6 these commissioners may appoint persons to execute the duties of the several offices necessary to such management and collection, under the control of the commissioners; and by sect. 7 every person so employed on any duty or service is to be deemed the officer of the customs for that duty or service.

The defendant was employed under the above act, and 3 & 4 *Will.* 4, c. 52, s. 18; his duty being to collect the duty on any goods for which an entry should be tendered, and upon payment of the duty to sign a bill of entry as a receipt, the same being a warrant for delivery of the goods from the proper officer. Held:—1. That defendant, as such collector, filled a ministerial office; that he was a substantive officer of the crown, and not merely the servant of the commissioners. 2. That he was liable in case for refusing to sign such bill of entry for a person who had tendered the duty payable on his goods.

By 3 & 4 *Will.* 4, c. 52, s. 50, "All foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom," are subject to the same duties as imported goods of the like kind, provided "that all such goods, as cannot be sold for the amount of duty due thereon, shall be delivered over to the lord of the manor or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and be charged with duty accordingly." Held, that the word "wreck" was not to be construed in the limited sense of goods forfeited for want of due claim by the owner; and that foreign goods, which after they had been imported into this country, warehoused and entered for exportation to Antwerp, were shipped and consigned thither, and, the ship having gone to pieces at the commencement of the voyage, were thrown on the English coast, were "wreck" within the meaning of the clause, although claimed within a year and a day by the owner, and never in any other hands; and that, as they could not be sold for the amount of duty payable thereon, they were also within the proviso, and not liable to any higher duty than that on unenumerated goods.

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have agreed to the following case:—In or about March, 1836, the tobacco in question, amounting to 38,596lbs. weight, having been (together with a certain other quantity of the same now lost) imported into Great Britain from the place of its growth, and warehoused in certain warehouses at Liverpool, being then the property of *W. & G. Browne & Co.*, was duly entered for exportation from the port of Liverpool by *Joseph Johnstone*, consigned to *J. Parwell Pilgrim*, Esq, at Antwerp, in the kingdom of Belgium, and then shipped on board a ship, called the *London Packet*, bound for Antwerp, with which tobacco the said ship sailed on the said intended voyage, but shortly after leaving Liverpool viz. on or about the 29th March, the said ship, after she got out of the limits of the port of Liverpool, met with contrary winds and bad weather, and was thereby forced and compelled to re-enter the limits of the said port, when and where she struck on certain sands in the Irish sea, within the said limits, and was broken to pieces and became a total wreck, and all persons on board were drowned, but the tobacco in question, which formed part of the ship's cargo, was saved, that is to say, some of it was found floating on the sea, and the remainder was thrown on the shore of the English coast by the sea, and was conveyed to the warehouse of Mr. *Atherton*, the lord of the manor, into which the said tobacco was brought or came as aforesaid, and the tobacco was afterwards conveyed to a certain warehouse at Liverpool, where it was sold on the 12th of April, 1836, by the order of *Johnstone*, with the consent of the proper officers of the commissioners in that behalf, and the proceeds were applied first to the payment of salvage and other usual charges, and then to the benefit and partial relief of the underwriters, who had insured the same against loss by peril of the sea, and the plaintiff being the highest bidder for it became the purchaser of the same. Unmanufactured tobacco was, on the 6th of August, 1836, subject to a duty of customs on importation into the United Kingdom of 3s. per lb., but on that day the tobacco in question had by the

absorption of the sea water increased in weight in the proportion of 60 per cent. In consequence of the damage it had thereby sustained, under the circumstances hereinbefore detailed, it could not be sold for a sum amounting to 3s. per lb. on its then weight, and was not in fact worth more than a total sum of 2892*l.* 13*s.* 6*d.* By 3 & 4 *Will.* 4, c. 52, s. 50, it is enacted, that all foreign goods derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to, provided that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor, or other person entitled to receive the same, and shall be deemed unenumerated goods, and by the 3 & 4 *Will.* 4, c. 56, schedule "Inwards," unenumerated goods unmanufactured, are subject only to an ad valorem duty of 5*l.* for every 100*l.* of the value.

The defendant was, at the time of the tender hereinafter mentioned, the collector of customs for the port of Liverpool, and employed in the duty of collector by the order and with the concurrence of the commissioners of customs. His duty was to collect the proper amount of duty on each article for which an entry was tendered, and, upon such duty being paid, to sign a bill of entry acknowledging the receipt, which then became a warrant authorizing the delivery of such article from the charge of the proper officers. He had not, according to the proper course of his office, the actual custody of, or control over, the articles upon which the duty was payable, nor had he in fact the actual custody or control of the tobacco in question, except that the officers who had such actual custody and control might not deliver the article to the owner without such bill of entry being so signed.

On the 6th August, 1836, the plaintiff tendered to the defendant the sum of 144*l.* 12*s.* 8*d.*, as and for the customs duty due on the tobacco on its being entered for home con-

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sumption, being at and after the rate of 5%. for every 100% of the value of the tobacco, and tendered to the defendant the usual bill of entry for the signature of the defendant, with two duplicates of the bill of entry duly made and written, at the same time offering to deliver to the defendant as many more duplicates of the same as he should require, when the defendant refused to accept the sum of 144%. 12s. 8d. in discharge of the customs duties payable in respect of the tobacco, and also refused to sign the bill of entry acknowledging the receipt, without which signature the officer having the custody of the tobacco could not deliver it to the plaintiff.

The questions for the opinion of the Court are, first, Whether the tender was sufficient? and if so, then, secondly, Whether the defendant is liable to this action under the above circumstances? If the Court shall be of opinion in the affirmative on both the questions, then judgment to be entered for the plaintiff for the damages laid in the declaration, to secure the delivery of the tobacco to the plaintiff (on payment by the plaintiff to the crown of the said sum of 144%. 12s. 8d.), and also to secure the payment of costs and of such further sum for damages as shall or may be awarded to the plaintiff by an arbitrator to whom the question of such damages shall be referred. But if the Court shall be of opinion in the negative on either question, then the judgment to be entered for the defendant, with costs.


Channell for the plaintiff (a). The first question to be considered in this case is whether the sum tendered by the plaintiff, and which was 5% per cent. on the value of the tobacco, was the sum properly payable as duty, or whether a much larger sum, after the rate of 3s. for each pound of tobacco, was payable. This depends upon whether this tobacco was not within 3 & 4 Will. 4, c. 52, s. 50, which enacts that "all foreign goods derelict, jetsam, flotsam and

(a) In Easter term (April 26) before Lord Denman C. J., Littledale Pattenon, and Coleridge Js.

wreck, brought or coming into the United Kingdom, &c., shall be subject to the same duties as goods of the like kind imported &c.," and so liable, generally, to the higher rate of duty above-mentioned, but exempted from it, specially, by the concluding proviso of that section, which says "that all such goods as cannot be sold for the amount of duty due thereon, shall be deemed to be unenumerated goods, and be liable" to the lower rate of duty imposed upon such goods at the close of the schedule 'Inwards,' 3 & 4 Will. 4, c. 56. The tobacco in question, not having been imported but having come in as wreck, falls within the general words of the former part of the above clause; and if so, as it could not be sold for the amount of duty, it must also fall within the concluding proviso applicable to unenumerated goods. But it will be said, that this tobacco was not wreck, and therefore not within the clause at all. It must be admitted that it was not wreck in the limited sense of the term, which applies only to goods not claimed under the statute of Westminster 1st (3 Edw. 1, c. 4) within a year and day, and therefore forfeited to the crown or its grantee. If it had been wreck in this sense the plaintiff must fail, as he could have no property in it. It was formerly supposed that, in order to prevent the forfeiture of goods from wreck, some man or animal must have escaped alive from the ship; but that doctrine, as appears from 1 Bl. Comm. 292, is exploded, and it is enough if within a year and day proof can be made of the property. It is clear that the word "wreck" has two senses, and that in 3 & 4 Will. 4, c. 52, s. 50, it is used in the more extended sense of goods cast on shore from a wrecked vessel. These meanings of the word were discussed in this Court in the *Bailiffs of Dunwich v. Sterry* (a), and are noticed in its judgment:—"We are, therefore, of opinion that the plaintiff had a special property in, and consequent right of action for the taking of, the cask in question; and that it was wreck within the meaning of that term in the law, so as to entitle the grantee to seize it,

(a) 1 B. & Ad. 831, 845.

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though it was not 'wreck,' so as to become finally his absolute property, in which sense that word is used in some of the text writers, and in the statute of Westminster the First." On this subject a passage at the end of *Constable's* case (a), "wreck is estray in the sea coming to land," 2 Inst. 167; Molloy de Jure Marit. B. 2, c. 5, ss. 6, 8, & 9, and Com. Dig. tit. Wreck may be referred to. It appears from 52 Geo. 3, c. 159, s. 1, that doubts existed whether "tobacco derelict, jetsam, flotsam, lagan, or wreck brought or coming into this kingdom," was subject to duties, and the same duties are then imposed upon it as if it had been regularly imported. Express words being necessary to impose a duty, it would be strange that the 3 & 4 Will. 4, c. 52, s. 50, should have applied itself to wreck in the limited sense only. But the very context, "derelict, jetsam, and flotsam," with which "wreck" is found, shews it to be used in the larger sense of unforfeited goods, and as distinguished from goods voluntarily brought to the country by the act of their owner. "Derelict" has the same extended signification. Sir Wm. Scott says, in the case of the *Aquila* (b), "this is a case of a ship and cargo found derelict at sea, and certainly it is a case of legal derelict; for it is by no means necessary to constitute derelict, that no owner should afterwards appear." Sect. 51 also shews that "wreck" is not confined to goods forfeited after the year and a day, for it requires any person, having in his possession "such goods" as mentioned in the previous section, to give notice thereof, and then either he, or the lord of the manor, if he has a just claim, may retain the goods on giving security for payment of the duties thereon "at the end of one year and one day." The 52 Geo. 3, c. 159, s. 2, contained a similar provision, and wreck seems to be used with the same latitude in 1 & 2 Geo. 4, c. 75, s. 29, for it speaks of the "owners of wrecked goods." According to the construction contended for on the other side, if no owner of t

(a) 5 Rep. 108 b.

(b) 1 Rob. Adm. Rep. 40.

goods had appeared, and the grantee of the crown had, in consequence, become entitled, he would have to pay only the lower duty on them, as unenumerated goods, whereas if the owner, who ought to be more favoured, prevents their forfeiture by claim within the year and a day, he has on the same goods to pay the higher duty.

II. If, then, the right amount of duty was tendered to the defendant, he is liable to this action for not signing the bill of entry. The 3 & 4 Will. 4, c. 52, s. 18, notices the office of collector, which the defendant filled; by that section the person entering goods inwards is to deliver a bill of entry to the collector and to pay the duties, and the collector's signature to the bill is to be the warrant for delivering the goods. From this, and from the description of his duties in the special case, it is clear that a duty was cast on the defendant, as a *ministerial officer*, to sign the entry, and he is liable, since from his default the plaintiff has been prevented from obtaining possession of his goods: *Schinotti v. Bumsted* (a), an action against the lottery commissioners; *Benningfield v. Stratford* (b), against an excise collector; and *Rex v. The Commissioners of Customs* (c), in which this point was admitted.

T. F. Ellis contra. As to the first point: This is an attempt to raise, as between the plaintiff and a servant of the crown, a question which would be more properly determined on petition of right to the crown itself. No servant of the crown, merely as such, undertakes any duty which makes him liable to an action for a nonfeasance. In *Gidley v. Lord Palmerston* (d) it was held that no action lay against the secretary at war for a clerk's retired allowance, although the defendant had received the money applicable to such allowance. *Dallas C. J.* observes, in delivering judgment in that case, "With reference to this ground, it will be sufficient


(a) 6 T. R. 646.

(b) In Q. B., 1821, MS., cited from the brief of Mr. *Denman*, one of the counsel in the case.

(c) 5 A. & E. 381; S. C. 6 N. & M. 828.

(d) 3 B. & B. 275.

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to advert to a class of cases, too well known and established to be more particularly mentioned, and which, in substance and result, have established that an action will not lie against a public agent for any thing done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability: such persons, said Lord *Mansfield*, in one of the cases cited at the bar (*a*), are not understood personally to contract; and in the same case it was observed by Mr. Justice *Ashurst*, "In great questions of policy we cannot argue from the nature of private agreements." To this rule there are exceptions, where a public servant has cast upon him by statute certain duties of so definite a nature that he is no longer considered an ordinary servant of the crown, but a statutable functionary, as in *Schinotti v. Bumsted* (*b*), and in *Lacon v. Hooper* (*c*). Now 3 & 4 Will. 4, c. 52, s. 18, does not, it is to be observed, enjoin the collector to do any act whatever; *he* is not *commanded* to sign the bill of entry, but "such bill being duly signed by the collector," is to be the warrant for the delivery of the goods; the matters therein provided are by way of regulation, and are merely descriptive of the routine of such delivery, but are not mandatory on any person. By 3 & 4 Will. 4, c. 57, s. 2, commissioners are appointed to collect the customs throughout the kingdom; the commissioners, therefore, are the collectors. [*Coleridge J.* Do you contend that the collector is a mere agent of the commissioners of customs? Would the signature of one of the commissioners satisfy the statute?] Yes, and the action is maintainable against them, as in *Lacon v. Hooper* (*c*), if at all. A servant is not liable to a third party for a nonfeasance, because he owes him no duty: he is liable for a misfeasance; but that is as a trespasser, the master's authority not legalizing a trespass. In *Lane v. Cotton* (*d*), where it was held that the postmaster-general was not liable for the loss of a

(*a*) *Macheath v. Haldimand*, 1 T. R. 172.

(*b*) 6 T. R. 646.

(*c*) 6 T. R. 224.

(*d*) 12 Mod. 472.

letter containing Exchequer bills, the following dictum of *Holt* C. J., though he was in a minority on the general question in the cause, was not disputed, and has ever since been recognised as sound law (a): "His neglect is only chargeable on his master or principal, for a servant or deputy, *quatenus* such, cannot be charged for negligence, but the principal only shall be charged for it; but, for a misfeasance, an action will lie against a servant or deputy, but not *quatenus* a servant or deputy, but as a wrong-doer." *Howell v. Batt* (b) is an authority on the same point. The liability of the defendant to this proceeding may be tried by three tests: 1. If he is liable because the statute has imposed upon him the alleged duty, mandamus would lie, *In re Baron de Bode* (c); but *Rex v. The Commissioners of Customs* (d) shews that mandamus would not lie. The reason assigned by *Littledale* J., in the case last cited, is this, "The defendants," he says, "are the officers of the crown. A mandamus to them, in this case, would be like a mandamus to the crown, which we cannot grant:" the other reasons for refusing the writ appear to be overruled by *Rex v. Payn* (e). 2. The collector is clearly not a principal within 3 & 4 Will. 4, c. 52, s. 2. Suppose a difference of opinion between him and the commissioners as to the amount of duty payable on any goods, he could not take a lower duty than the commissioners, who are the real collectors, should order him. 3. If the crown were sued by way of petition of right, it would be no answer to say that the collector had not signed the entry, and that therefore it was that the goods had not been delivered, for the reply would be obvious, that he was a mere servant, and that his principals should have commanded him to sign.

II. These goods were not "wreck" within 3 & 4 Will. 4, c. 52, s. 50. All the definitions of wreck, as in *Termes de la Leye*, and in 2 Inst. 166, where *Bracton* is cited, apply

(a) 12 Mod. 488.

(d) 5 A. & E. 381; S. C. 6 N.

(b) 5 B. & Ad. 504; S. C. 2 N. & M. 828.

& M. 381.

(e) 6 A. & E. 392; S. C. 1 N.


(c) 6 Dowl. P. C. 776, 792.

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to goods of which the owner is unknown. In 2 Inst. 167, also, *Bracton* is again cited, "Item tempore dicuntur res in nullius bonis esse, ut thesaurus. Item ubi non apparet dominus rei, sicut est de wrecco maris." The reason, too, why wreck vests in the crown is given in the same part of the 2d Inst., viz. that the property of all goods must be in some person, and that where no subject claims any property in them, *as in the case of wreck*, they must belong to the crown. According to this authority, therefore, it would be incorrect to call any thing wreck where the owner comes forward. In *Hamilton v. Davis* (a), the law on this subject was much considered, and throughout the argument and judgment in that case, the question whether goods are *wrecked*, and whether they are *forfeited* as wreck, are treated as identical questions. In *Dunwich v. Sterry* (b), the plaintiffs failed to shew that the word "wreck" had two distinct meanings, and the case itself proves nothing more than that the grantee of the crown has an initiatory property in goods stranded, subject to be divested if the owner of them should appear; a decision which agrees equally well with either the one sense of "wreck" or the other, and cannot therefore be said to determine which is the right sense. In 5 Geo. 1, c. 11, s. 13, *stranded* goods are expressly distinguished from "wrecked goods, or jetsam, flotsam or lagan," and made subject to the same duties as imported goods. What then are goods stranded but not wrecked, unless such goods as are cast on shore but saved from forfeiture by the owner of them claiming within the year and a day? The 6 Geo. 4, c. 107, s. 47, enacts that the owner or salvor of any property liable to duty, and saved from the sea, may sell, free from duty, sufficient to pay salvage. Section 48 of the same statute has a distinct provision as to derelict, jetsam, flotsam and wreck, and its language is inconsistent with the notion that there could be a known owner to such goods. It appears therefore from the above enactments, that there are certain goods which may be stranded and saved, and yet are not

(a) 5 Burr. 2732.

(b) 1 B. & Ad. 831.

wreck. So the principal statute in this case, 3 & 4 *Will.* 4, c. 52, s. 49, contains a similar provision for the sale by the salvor of goods liable to the payment of duty *saved from sea*. The 50th section, therefore, as to wreck, must apply to goods which are not to be taken as saved, but as goods of which the owner is unknown. By that section the commissioners, if any question arise as to the origin of such goods, are directed to determine of what country they are the growth: does this appear to point at goods of which the owner is known? The other part of this section, which has been cited, was not intended to lower the duties on goods damaged by the sea, for that is provided for by sections 30 and 31. Reliance has been placed on sect. 51, which allows such goods as are the subject of the preceding section to be retained, on giving security to pay the duties thereon at the end of a year and a day, and which shews, it is said, that goods “wrecked,” in the limited sense of the term, are not intended. But the whole provision excludes the supposition that goods of which the owner is known are intended. Who is to give the above-mentioned security? The lord of the manor, or the party having possession? The *owner* is not mentioned at all. The *owner* of imported goods may warehouse them at once, under 3 & 4 *Will.* 4, c. 56, s. 8; and by 3 & 4 *Will.* 4, c. 57, s. 14, he need not pay the duties until the expiration of three years from the time of warehousing them. That provision will extend to the goods in question, how then can they be brought within another provision, which presupposes that their owner is not known? The object of 3 & 4 *Will.* 4, c. 52, s. 50, appears to have been to define the duty payable upon goods not intentionally imported, and of such trifling value as not to be followed by the owner.

III. The goods in question were not “brought, or coming into the United Kingdom,” within 3 & 4 *Will.* 4, c. 52, s. 50; they were entered for exportation to Antwerp, and the owner must have entered into a bond, under 3 & 4 *Will.* 4, c. 57, s. 42, so to export them.

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Channell in reply. I. The cases cited to shew that no action will lie against the defendant were chiefly cases of contract. In *Schinotti v. Bumsted* (a) the principle is broadly laid down, that ministerial officers are chargeable under circumstances like the present. It is contended that the defendant is not liable, on the ground that he is merely a servant under the commissioners. But on that ground the commissioners themselves might claim immunity, for they might be treated as servants under the Treasury. By the 3 & 4 *Will.* 4, c. 52, however, the duties of the controller and collector are clearly marked out. They are substantive public officers, and, if neither mandamus nor action lie against them, they must go altogether unquestioned. The passages from *Bracton* and all the other authorities were present to the mind of *Parke J.* in delivering the judgment of the Court in *Dunwich v. Sterry* (b), yet he lays it down that "wreck" has two distinct senses. The 5 *Geo.* 1—c. 11, s. 13, does not speak of stranded goods, but of goods saved out of any vessel stranded on the coasts of this kingdom. It appears that the statute of Westminster was only declaratory of the common law, for in that very statute the year and a day is referred to. It is said that sections 30 and 31 of 3 & 4 *Will.* 4, c. 52, make allowance for a diminution of duty on damaged goods, but that is only when the voyage is completed, and the damage is sustained during the voyage. As to the provision respecting the duty not being payable by the owner for three years, it is inapplicable, and relates solely to goods imported and warehoused.

II. These goods were warehoused on importation, and the owner would be entitled to drawback on exportation. It cannot be denied that they were goods of foreign growth, and that they were goods "coming into the United Kingdom," although casually and not by the agency of the owner.

Cur. adv. vult.

(a) 6 T. R. 646.

(b) 1 B. & Ad. 831.

LORD DENMAN C. J. now delivered the judgment of the Court. Two points were made in this case. The first in importance and order was whether, assuming that the plaintiff had tendered the proper amount of duty, any action could be maintained against the defendant for refusing to accept it, and sign a bill of entry, whereby the plaintiff was prevented from obtaining the delivery of the tobacco in question and selling it to advantage; and we are of opinion that such action is maintainable although no malice or ill motive is imputed to the defendant. The case states him to be the collector of customs at Liverpool, employed as such by the order of the commissioners, and "that his duty is to collect the proper amount of duty on each article, for which an entry shall be tendered, and, upon such duty being paid, to sign a bill of entry acknowledging the receipt, which then becomes a warrant for the delivery of the article from the charge of the proper officer." By 3 & 4 Will. 4, c. 51, s. 2, her Majesty is authorized to appoint commissioners for the collection and management of the customs; by sect. 6 the Treasury, or these commissioners under the authority of the Treasury, may "appoint proper persons to execute the duties of the several offices necessary to the due management and collection of the customs and all matters connected therewith, under the control and direction of the commissioners; and by sect. 7, every person, employed on any duty or service relating to the customs by the orders or with the concurrence of the commissioners, shall be deemed to be the officer of the customs for that duty or service.

Taking the statement in the case and these clauses together, the defendant appears to be not merely the agent and servant of the commissioners, but to be himself a substantive and immediate officer of the crown, and he is charged with the execution of a certain limited duty. It is true that in the performance of that duty he is subject to the control of the commissioners; but it is still his own duty, not theirs, that he is to perform; the acts which he does are his own acts, not theirs; their control is not an

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arbitrary one, but limited by the provisions of the statute wherever they apply, and does not absolve him from responsibility to persons affected by the due performance or neglect of his duties.

The nature of those duties is next to be considered, and as regards the present question they are plainly and merely ministerial; he is, according to the statement, to collect the proper amount of duty, and sign the bill of entry. This is not the less a ministerial duty, because in some instances, as in the present, it may not be clear upon the face of the statute what the proper amount of duty may be; difficulties both of law and fact arise repeatedly to ministerial functionaries such as the sheriff, in the discharge of his duties, but these do not alter their nature.

The defendant then is a public ministerial officer, and being so he is responsible, for neglect of his duty, to any individual who sustains damage by such neglect. *Schinotti v. Bumsted* (a) is a strong authority to this effect, the facts in that case respecting the commissioners of the lottery tending much more to raise a doubt whether the defendants had not a judicial discretion entrusted to them. And in *Lacon v. Hooper and others* (b), which was an action against the Commissioners of Customs for not making a certain order for the payment of money, to which the plaintiff claimed to be entitled under an act for the encouragement of the South Sea Whale Fishery, it was not questioned but that even they would be liable to the action, if the neglect of duty were made out.

We pass therefore on to the second question—Whether, under the circumstances stated in the case, the tobacco in question is to be considered wreck, within the 50th section of the 3 & 4 Will. 4, c. 52. It is conceded by the plaintiff that, if the word “wreck” in that clause be confined to that only which would pass to the crown or the crown’s grantee under the prerogative or franchise of wreck, these goods do not fall within that predicament; but it is contended by him that the word is not to be construed in so

(a) 6 T. R. 646.

(b) 6 T. R. 224.

limited a sense ; and we are of opinion that, according to established rules of construction, it ought not to be so construed. The section in its enacting part professes to extend to all “ foreign goods derelict, flotsam, and wreck brought or coming into the United Kingdom,” and, without reference to their condition or value, subjects them to the same duties as imported goods of the same kind. If this section had stopped here it would have been difficult to say that these goods were *imported* goods, for they were in the act of exportation. The owners had done nothing except with a view to exportation. Against their will, by the violence of the storm, they were separated from the vessel in which they were placed, and from the charge of those to whose custody they were entrusted, and either cast on shore, or, being found floating, carried thither. If imported, by whom could they have been said to have been imported ? But, if not imported, were they liable to *no* duty ? Would it not then have been reasonably urged that they fell within the very words and intent of the enactment, and became subject *as wreck* to the same duty as if they had been imported ? If so, we must necessarily apply the same rule of construction to the proviso at the end of the section to *relieve* them, as we should have done to the enacting part to *charge* them. The word “ wreck ” no doubt in both parts comprehends goods which strictly and technically speaking are “ wreck,” but, as it is capable also of a larger sense, and as in both parts the object of the section can only be fully obtained by giving it that larger sense, we ought so to understand it. We are additionally led to this by considering that the term of contrast to the word wreck is not goods unforfeited, or goods whereof the owner is known, but goods imported, as if the distinction present to the minds of those who framed it, was not between goods subject and goods not subject to a franchise, but between goods arriving in the regular course of importation and those coming by the casualties of the seas and storms, and accordingly by the

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proviso they are to be delivered over to the lord of the manor, or (using the most general words), "other persons entitled to receive them."

Upon both grounds, therefore, we think the plaintiff entitled to maintain the action and to our judgment, according to the terms provided in the special case.

Judgment for the plaintiff.

  
**The QUEEN v. The EASTERN COUNTIES RAILWAY COMPANY.**

*Friday,*  
*June 21.*

A company empowered by statute to make a railway from London to Norwich and Yarmouth, passing through Colchester, and required to set out any deviations from the parliamentary plan before the 27th July, 1839, and to make their compulsory purchases of land before the 27th July, 1840, had, for two or three years, proceeded with great activity to complete the line as far as Colchester,

but on May the 6th, 1839, had not commenced proceedings for carrying on the line beyond Colchester. This course was approved of by the shareholders at large, and the funds of the Company were nearly exhausted, but it appearing doubtful whether the Company had any bona fide intention of completing the entire line, this Court, at the instigation of a small proportion of shareholders and of a few landholders on the line, made a rule for a mandamus to the Company to set out their deviations, and make the necessary purchases below Colchester.

**SIR J. CAMPBELL** A. G. in Easter term last, (the 6th May) obtained a rule to shew cause why a mandamus should not issue to the above Company commanding them to proceed to make and complete a railway from London to Norwich and Yarmouth, passing by Romford, Chelmsford, Colchester, and Ipswich, according to the provisions of 6 & 7 Will. 4, c. cvi. (local and personal) intituled "An Act for making a Railway from London to Norwich and Yarmouth, by Romford, Chelmsford, Colchester and Ipswich, to be called "The Eastern Counties Railway," and of 1 & 2 Vict. c. lxxxi. (local and personal), intituled, "An Act to amend and enlarge the Powers and Provisions of the Act relating to the Eastern Counties Railway," and especially to set out and define the line of the said railway (particularly that part thereof lying between Colchester and Norwich, and Norwich and Yarmouth) deviating from the line laid down on the plans in the said last-mentioned Act, and in that behalf referred to, and to proceed to purchase the lands necessary to the making and completing the said railway.

way, and lying between Colchester and Norwich, and Norwich and Yarmouth aforesaid, pursuant to the said several acts of parliament in that behalf contained.

The preamble of 6 & 7 *Will.* 4, c. cviii. s. 1, (local and personal, 4th July, 1836,) recited that the making a railway from London to Norwich and Yarmouth, passing by Romford, Chelmsford, Colchester, and Ipswich, would be of great public advantage, by opening an additional certain and expeditious communication between those cities and towns and the intermediate and adjacent towns and districts, and also by facilitating the means of intercourse between the metropolis and the eastern districts of England, and that the several persons thereafter mentioned were willing at their own costs and charges to carry the undertaking into execution. The section then proceeded to incorporate the subscribers by the name of the “Eastern Counties Railway Company,” for the purpose of making and maintaining the said railway, with power to take lands for the use of the undertaking.

By sections 3 and 5 the Company were empowered to raise 1,600,000*l.* for the purpose of making the railway, and otherwise carrying the act into execution. Section 6 empowered them to make the railway according to the line delineated in the parliamentary plan, commencing at Shore-ditch, London, and terminating at Norwich and Yarmouth.

By sections 54 and 55 the lands to be taken for the railway were not to exceed, in general, twenty-two yards in breadth, with a power to deviate from the plan to the extent of one hundred yards, limited to ten yards in passing through any town.

Sections 130 and 131, provided for the holding of general meetings, and special general meetings to be called by the directors on the requisition of twenty shareholders.

Section 144 empowered the directors to superintend all the affairs of the Company, and do all acts whatsoever for carrying into effect the purposes of the act, and for the management of the affairs of the Company.

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By section 220 the whole capital was to be subscribed for, before the compulsory powers, given to the Company for taking land, could be put in force.

By section 222, if the land, which they were empowered to take, were not purchased within two years, their compulsory powers of taking land were to cease.

By section 223, if the railway should not be completed within seven years, all the powers, authorities and privileges given by the act were to cease, except as to so much of the railway as should be then completed.

By sections 246 and 252 the Company, if the sum subscribed for should be insufficient, were authorized to raise 533,333*l.* by mortgage or by way of augmentation of their capital stock.

By section 254, if the railway, or any part thereof, should at any time thereafter be abandoned, or, after the same should have been completed, should for the space of three years cease to be used as a railway, then the lands authorized to be taken by the Company, over which the railway, or part of it so abandoned, should pass, were to revert to the owners for the time being of the adjoining lands in equal moieties.

By 1 & 2 Vict. c. lxxxi. s. 2, (local and personal, 27th July, 1838,) the time limited by the prior act for the compulsory purchase of land was extended for the further term of two years, to be computed from the expiration of the period limited by the prior act; provided that, after the expiration of *one year from the passing of the new act*, it should not be lawful for the Company to deviate the centre line of the railway, as laid down in the parliamentary plan, unless the Company should, at the expiration of the said period, have set out and defined their line of deviation.

The rule was obtained on the affidavits of eleven persons, shareholders in the Company and owners of lands over which the railway was to pass according to the parliamentary plan, who stated that, at the formation of the Company, the prospect of an entire line from London to Yarmouth had always been held out to persons whose support to the un-

dertaking was sought, and that the deponents had been induced to support it on account of the advantages to be expected from such entire line of communication. That 600,000*l.* of the capital had been paid up, and that, though active operations were going on for completion of the line from London to Colchester, no steps had been taken for some time past for setting out the line of railway or for purchasing any land below Colchester. That deviations would be necessary in the lower part of the line, and that this had been admitted by the engineer for the Company, and that if all possible dispatch were employed there would hardly be time to define such deviations within the period limited by the legislature, viz. the 27th July ensuing. That it was believed to be the Company's intention not to carry the line beyond Colchester; that the directors had been applied to on the subject, and declined to give any assurance of their intention to complete the line.

The affidavits of the chairman and engineer of the Company stated in answer that no deviations would be necessary, though in some few places they might be expedient, and that the engineer had never said that such deviations would be necessary. That the directors had considered it best for the interests of the Company to make the line continuous from London to the interior of the districts, through which the railway is intended to pass, finishing and opening portion by portion; that, in furtherance of this plan, all the land requisite between London and Colchester had been agreed for, but it was admitted that scarcely any land at all had been agreed for below Colchester. That at half-yearly meetings of the Company the shareholders had expressed their approval of the conduct of the directors in the appropriation of the whole of their first available means to the execution of that portion of the line between London and Colchester, inasmuch as when executed it would yield the larger amount of revenue. That without raising further sums the Company would not be able to complete the railway; that the total number of shares subscribed for and

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held by persons resident in Norfolk and Suffolk were only 562, and that such shares when fully paid up would only amount to 13,050*l.*; that out of the eleven deponents in support of the new rule, four were shareholders, holding in all 138 shares, and the remaining seven immediately connected with Norfolk and Suffolk; that about 40,000 shares were held by persons residing in Lancashire, and that it was believed that the holders of such shares, and of almost all the other shares, approved of the course pursued by the directors.

Sir *F. Pollock*, *Alexander* and *Austin* shewed cause (*a*). This Court will not issue a mandamus to compel the Company to complete their railway. The acts of parliament, by which the Company are constituted, authorise, indeed, but do not render it compulsory upon them to complete it; they might have abandoned the whole project immediately after the passing of their original act. That act itself (sect. 223) contemplates the very case of the non-execution of either the whole or part of the undertaking; and, in section 254, provides that, if it is abandoned, the lands taken are to revert to the adjoining owners. The parties applying to the Court have no specific right which warrants the issuing of a mandamus. In *Rex v. The Birmingham Canal Navigation* (*b*) it appeared that commissioners were empowered to make a canal from a place called New Hall Ring, Birmingham, and from such other places near the town as might be found convenient. The commissioners had begun a cut to another part of the town, and had declared their intention to make no canal to or from New Hall Ring. A rule which had been obtained for a mandamus to the Company to complete the navigation by making a cut to New Hall Ring, was discharged, Lord *Mansfield* C. J. saying, "the act imports only an authority to the proprietors, not a command. They may direct or suspend the whole work, a

(*a*) June the 10th, before Lord *Denman*, C. J. *Littledale*, *Patte-* son and *Williams* Js.  
(*b*) 2 W. Bl. 708.

fortiori any part of it." Out of the numerous applications for mandamus to public bodies, as in *Lee v. Milner* (a), *Rex v. Bank of England* (b), *Rex v. London Assurance Company* (c), *Rex v. The Benchers of Lincoln's Inn* (d), *Rex v. The Inhabitants of Cumberworth* (e), *Rex v. The Inhabitants of Edge Lane* (f), no case has arisen which can be applied as an authority for the present rule. By section 144 of the original act the directors have full power to manage the affairs of the Company, and shareholders have no right to interfere with their management, except by requiring them to call a special general meeting, under sect. 131. It appears plainly that the majority of the shareholders entirely approve of the course pursued by the directors, and the very small minority constituting the applicants for this rule must be bound by the will of the majority. This Court will not control the discretion vested by the legislature in the directors. It is a good return to a mandamus to admit a fellow of a college, that the college was subject to the orders of a visitor *Rex v. Alsop* (g). *Rex v. Paddington Vestry* (h) and *Rex v. Wilts and Berks Canal Navigation* (i) may also be referred to on this point. If the circumstances of this particular case, as disclosed in the affidavits, are considered, it will be found that the directors have exercised their discretion properly. Their funds, it appears, are insufficient for the completion of their whole line; they have, therefore, prudently applied them to the completion of the line between London and Colchester, as being the most productive part of the line, for the purpose of providing funds to finish the remainder. The affidavits in support of this rule lay stress on the circumstance that the Company have not set out the necessary deviations between Colchester and Yarmouth. The answer is that the engineer states

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(a) 2 M. &amp; W. 824.

&amp; E. 731; S. C. 1 N. &amp; P. 197.

(b) 2 B. &amp; Ald. 620.

(f) 6 N. &amp; M. 81.

(c) 5 B. &amp; Ald. 899; S. C. 1 D. &amp; R. 510.

(g) 2 Show. 170.

(d) 4 B. &amp; C. 855; S. C. 7 D.

(h) 9 B. &amp; C. 456.

&amp; R. 351.

(i) 3 A. &amp; E. 477; S. C. 5 N. &amp; M. 344.

(e) 3 B. &amp; Ad. 108; and 4 A.

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that no deviations are necessary. Besides, the time for setting out such deviations will not expire before the 27th July, 1839, and the Company cannot be called upon now. The same answer may be given to the complaint that the Company has not made the necessary purchases of land below Colchester; the time allowed for such compulsory purchases does not expire before the 27th July, 1840, and for purchases by arrangement is extended for a much longer period.

Sir *J. Campbell* A. G., *Cresswell*, *Kelly*, and *O'Malley*, contra. The general principles laid down by Lord *Eldon* C. in *Blakemore v. Glamorganshire Canal Navigation* (a), apply to the present case, and warrant the interposition of this Court. *Rex v. Severn and Wye Railway Company* (b) also is a general authority on this subject; and in *Rex v. Cumberworth* (c) the observations of all the judges of this Court are applicable to shew that the Company in this case have entered into one entire contract with the public, and that the powers given to them by the legislature are in respect of their whole undertaking. The legislature has given the present Company no power to make a railway from London to *Colchester*; and the Company could not justify a trespass by alleging that they entered on lands for the purpose of making such a line. Suppose that there were two competing lines before parliament, one to *Colchester* only, and the other on to *Yarmouth*, and that the *Colchester* line, being preferable in other respects, succeeds on the promoters of it undertaking to carry on their line also to *Yarmouth*; could the successful line be allowed subsequently to stop short at *Colchester*? A person having a house and farm in *Essex* may have supported the present Company's bill, although his property would be injured in the first instance by the railway passing through it, on the very ground that he would be compensated in the end by the facilities held out to him for conveying his produce to

(a) 1 Mylne & K. 154.

(b) 2 B. & Ald. 646.

(c) 1 N. & P. 197; S. C. 4 A. & E. 731.

Yarmouth. It is said that this application to compel the Company to set out deviations and purchase land is premature, because their time for doing the acts required has not expired; but, if made after that time had expired, the application would clearly be too late, for this Court would have no power to compel the performance of the acts required, unless within the time limited by the legislature. It is true that sect. 144 gives the directors power to control the shareholders, but that is "for carrying into effect the purposes of this act," not for the purpose of stopping them. And, even if the directors had this latter power as against the shareholders, they have it not as against the public. *Rex v. Birmingham Canal Navigation* (a) has been relied on, but that was not the case of a private speculation, for the fulfilment of which certain individuals, desirous of profit, had obtained powers from the legislature on stated terms; and it appears also that the commissioners had a discretion to make a cut in one place or another near Birmingham, "as may be found convenient." With regard to the statement that the Company's funds are insufficient for their objects, it shews that they have imposed on the legislature: the same excuse was offered in the recent case of the *South Level Drainage* (b), but the Court would not listen to it. The Company are empowered to borrow money, and, if they have not money to go on with, they must get it. As to the fact, whether deviations will or will not be necessary, the affidavits are conflicting, but the improbability is very great that the line laid before parliament can be exactly followed.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court:—This was an application for a mandamus to do certain acts therein specified: and it was observed on both sides, in the course of the discussion, and we think with

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(b) Not reported.

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great truth, that the questions involved in it are of much novelty, and of at least equal importance. Because, as on the one hand, much mischief may ensue, if this Court should improvidently enjoin the performance of things impracticable or improper; so, on the other, is there no higher duty cast upon this Court than to exercise a vigilant control over persons entrusted with large and extensive powers for public purposes, and to enforce, within reasonable bounds, the exercise of such powers, in compliance with such purposes, and the more so, as we are not aware of any other efficient remedy. The principles upon which these powers are conferred by the legislature upon undertakers of this description are now so fully understood, that it is not needful to do more than generally to refer to them. They are thus laid down by Lord *Eldon*, in the well known case of *Blakemore v. Glamorganshire Canal Company* (a):—"I apprehend those who come for these acts to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else; that they shall do and forbear all that they are thereby required to do and forbear, *as well with reference to the interests of the public, as to the interest of individuals.*" The same doctrine was acted upon by this Court in its fullest extent in the case of *Rex v. Cumberworth* (b). It remains only to add, that these cases and principles have been recently recognized by the Court of Exchequer, in the case of *Lee v. Milner* (c).

The reasons also which regulate the practice of this Court, in regard to writs of mandamus, are very plain and intelligible. Its interference is occasioned by inferior courts or persons refusing to proceed in some course prescribed by law; and not in consequence of any misapprehension or error in that course, provided they have entered upon it. And, accordingly, if it had appeared that the Company were substantially complying with the terms of their undertaking,

(a) 1 Myl. &amp; K. 154.

(c) 2 M. &amp; W. 824.

(b) 3 B. &amp; Ad. 108.

there would have been at once a satisfactory answer to the application.

Now the objects and purposes for which this Company has been incorporated and empowered, or, in the words of the passage cited, "what the legislature has empowered and compelled them to do and to submit to," are too clear to admit of any doubt. The title of the act itself—"for making a Railway from London to *Norwich* and *Yarmouth*."—the benefits recited in the preamble as likely to result from opening a communication, not only between the towns there more particularly enumerated, but also between the metropolis and the eastern districts of the kingdom, from which it is alleged that "*great public advantage*" would result, the eastern terminus being a sea-port of greater consequence than any in those eastern districts, together with a minute description of the whole line, and a particular enumeration of all the places through which it is to pass, precludes all question on this matter. We consider it to be equally undeniable that to carry the railroad through a portion only of the described line, such as a third or a half, is a nominal and not a real compliance with the meaning of the act of parliament. We are aware that we were met, in this part of the argument, by remarks upon the difficulty or impossibility attending the execution according to the prescribed terms. We confess, however, that we should have felt more impressed by observations of this nature, if we had not observed in the preamble of the act, which we must consider to have been proved, that certain persons therein named (and we consider the obligation as extending to their successors, who, from time to time, may constitute the Company), "were willing at their own costs and charges to carry the said undertaking into execution." Such difficulties, be they more or less, should have been duly estimated before the undertakers pledged themselves to the execution for the sake of obtaining such large and extensive powers as, most certainly, are vested in them for the purposes already mentioned. It was urged also that the time

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for completing the work is not yet elapsed. We were also referred to parts of the act (and particularly to the clause revesting the land, taken for the line, in the proprietors on each side), as indicating that the non-completion of the work was obviously within the contemplation of the legislature. We think, however, that a failure of the enterprise upon experiment and trial (which may of course happen to any scheme, however plausible or promising), is widely different from a design to abandon one part of the line, and to execute another, which it may be found more easy and profitable to accomplish.

We now come to consider whether, so far as appears to us, there be a bonâ fide purpose of completing the work. And, upon this part of the case, after making every possible allowance for the discretion to be exercised by the Company, as to the different degrees of exertion to be made in different parts of the line, it is impossible not to be forcibly struck by the different state of things beyond Colchester and between that town and London. Beyond we can discover no activity, whereas between London and Colchester we are given to understand that the whole line is in a state of great forwardness. The procuring land for the line is usually we believe, as reasonably might be expected, the first step in these cases; and yet, in this preliminary measure, the preparation beyond Colchester we perceive to be comparatively small and insignificant. Moreover, when we consider how indispensable, for purposes of this description, is the compulsory power of procuring land, (because, without it, the obstinacy or caprice of a single individual may put stop to the work at once,) we cannot help thinking that the answer of the Company to a request "that they will set out and define their line, deviating from the line laid down in the plans," (a mere precautionary measure to secure compulsory purchase) "that no deviation is requisite," is much more consistent with a determination not to proceed, than a well founded belief, that the original plan could have been

laid down with such perfect accuracy; as, in working, to require no deviation at all.

Upon the whole, without coming to any final decision, we think the case is involved in sufficient doubt to require a return to the mandamus, and that the writ should go for that purpose.

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Rule absolute.

Sir THOMAS WILSON, Bart., v. HOARE and others (a).

**ASSUMPSIT**, by the lord of the manor of Hampstead, for 3900*l.* for reasonable fines due from the defendants to the plaintiff, on the admission of the defendants into certain customary tenements, parcel of the manor, according to the custom of the manor. Plea, non assumpsit.

At the trial before Lord *Denman* C.J., at the Middlesex sittings after Trinity term, 1837, the following facts appeared:—

The plaintiff, before and on the 13th July, 1826, was and still is lord of the manor of Hampstead. In December, 1698, during the minority of the lord of the manor, his testamentary guardian granted to fourteen persons a certain portion of waste land, to hold to the grantees, their heirs and assigns, at the will of the lord, according to the custom of the manor, at a nominal rent. By indenture of the same date, made between the said testamentary guardian of the

An estate was granted by the lord of a manor to fourteen charity trustees, and by a decree in Chancery whenever nine lives should drop, new trustees were directed to be successively appointed by the lord, subject to the approbation of a master in Chancery on payment of a reasonable fine to the lord. The lord claimed double the admitted yearly value on the first

(a) Decided during Trinity term the former case of *Wilson v. Hoare*, last (May 28). See the report of 2 B. & Ad. 350.

life, half of that sum on the second life, half of the last amount on the third, and so on in a descending series:—Held, that a fine calculated on this principle was a reasonable fine, and that it was not competent to the defendant to shew that it would be unreasonable, from the lord's privilege of naming the lives, and the probability, for that reason, and on account of the necessity of charity trustees being persons of mature age, that the lives would fall more frequently than if they were nominated by the trustees.

*Quare*, whether the fine ought to be reduced on the ground that the renewal was to be not on the dropping of nine specified lives, but on the dropping of nine out of fourteen specified lives, and would therefore occur sooner.

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one part and the said grantees of the other part, it was declared and agreed that the grantees should stand seised of the said premises for the sole use and benefit of the poor of the parish of Hampstead successively for ever. In a Chancery suit, instituted in 1729 by the Attorney-General, on the relation of certain persons on behalf of themselves and others, inhabitants and poor of the parish, to which suit the lord of the manor and the then charity trustees were parties, it was decreed that the charity trust should be established, and the premises be held according to the terms of the trust deed, on payment to the lord of a reasonable fine upon surrender and admittance, according to the custom of the manor; and eleven of the trustees being then dead, and two others declining to act, it was ordered that the lord should, with the approbation of a master in Chancery, nominate thirteen others, being copyhold tenants of the manor and inhabitants of the parish, to complete the full number of fourteen trustees, and that the three surviving trustees should surrender the premises to the use of the remaining trustee, who was willing to act, and to the thirteen new trustees and their heirs, on the trusts of the deed of 1698, and that the lord should admit them on payment of a reasonable fine; and that, whenever at any time thereafter the number of trustees should be reduced to five, then the lord for the time being should, with the approbation of a master in Chancery, nominate nine others, qualified as aforesaid, to make up the full number, and that the lord should admit them on paying a reasonable fine. In 1826 twelve of the trustees were dead and the remaining two had resigned; and the defendants, fourteen in number, were, with the sanction of a master in Chancery, nominated by the lord, and duly admitted.


The fine, payment of which had been demanded and refused, was assessed on the following principles. In 1826 the premises were agreed to be of the yearly value of 1000*l*. Since the original grant other grants had been made by distinct copies of court roll, but it was agreed that one fine

should be assessed for all the tenements. Two years' value was taken for the first life, half that sum for the second life, half of the last sum for the third life, and so on, in a decreasing series through the fourteen lives, halving on each succeeding life the sum taken on the preceding. The fine so assessed would amount to about 3999*l.*, but a deduction of 99*l.* had been made from this sum, in conformity with the judgment of the Exchequer Chamber in a former proceeding between these parties (*a*), because the estate was not absolutely for nine given lives, but for the nine which should first drop out of fourteen. From the evidence of an actuary it appeared that 38*l.* and a fraction would have been a sufficient deduction on this account, assuming that there would always be a renewal when the number of trustees should be reduced to five, that no fine would be taken on the re-admission of the five old trustees, but that the assessment would begin with 62*l.* 10*s.*, the sum to be taken for the sixth in the series. The following were the ages of the several trustees at the time of their admission in 1826, viz.—44, 57, 59, 52, 54, 42, 60, 34, 43, 60, 64, 37, 36, and 30. Evidence was given to shew that by the custom of the manor two years' improved value was the fine payable on a single life, and that, where more than one life had been admitted, the fine, on some copyholds within the manor, had been assessed on the principle of the present fine, and, on others, on the principle of taking a half fine for the second life, a third of it for the third life, and so on, always taking an aliquot part of the *original* sum on each successive life (*b*). The following were the latest fines which had been paid for this estate, from time to time, previously to the admission of the present defendants:—

|                                                |     |
|------------------------------------------------|-----|
| 16th May, 1743, on the admission of eleven new | £   |
| with three old trustees . . . . .              | 150 |
| 16th May, 1763, on the admission of nine new   |     |
| with five old trustees . . . . .               | 151 |

(*a*) See this referred to, *post*, in the judgment of the present case.      (*b*) See *Wilson v. Hoare*, 2 B. & Ad. 350.


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| 1839.                                                                             | 19th July, 1783, on the admission of twelve new | £   |
|  | with two old trustees . . . . .                 | 450 |
| WILSON                                                                            | 2nd March, 1801, on the admission of ten new    |     |
| v.                                                                                | with four old trustees . . . . .                | 579 |
| HOARE                                                                             |                                                 |     |
| and others.                                                                       |                                                 |     |

The property had originally been waste, but had since been built upon, and had progressively improved in value since the time of the grant; but no new building had been erected on the property between 1801 (when the last fine was paid) and 1826, when the present defendants were admitted. In order to prove that the trustees were in fault for not renewing when the lives were reduced to five—that a proper deduction had been made from the fine—and that it was reasonable, inasmuch as no fine would ever be taken on the re-admission of the five remaining trustees if the renewal were made in time,—it was attempted to shew that no fine was taken within the manor on the re-admission of a joint tenant. But the instances adduced for this purpose were cases of husband and wife; as where *A.*, who had paid a fine on admission, afterwards surrendered in order to create an interest for his wife, no fresh fine was taken for the re-admission of *A.*, and the fine paid for the admission of his wife was the half of that originally paid by *A.* It appeared from the evidence of an actuary that, if the interest on one life, of thirty years of age, were worth 2000*l.*, the addition of any number of lives of the same age would not enhance the value beyond 3000*l.*, and that the interest on fourteen lives when reduced to five was not, by five or six years, of the value of an interest on nine lives absolute; and if 2000*l.* was a reasonable fine on a single life of thirty that, with reference to the circumstances of this particular case and on the assumption that a renewal would take place when the lives were reduced to five, the whole fine should not be more than 2111*l.* This evidence was objected to by the plaintiff.

His lordship left four questions to the jury. 1. Was it the custom of this manor to pay an arbitrary fine on a grant of copyhold of inheritance? Ans. Yes. 2. Was there any

custom for calculating the amount of fine payable by joint tenants? Ans. No. 3. Was there a custom for a former tenant, who is re-admitted as joint tenant, to be admitted without the payment of any fine? Ans. No. 4. Was the fine reasonable in fact according to the circumstances of the case? Ans. No.

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His lordship then directed a verdict for the defendants, but reserved leave, by consent, to move to enter the verdict for the plaintiff, if the Court should be of opinion that the affirmative finding on the first and the negative on the second question, entitled him, as a matter of law, so to enter the verdict.

*D. Pollock*, in the following Michaelmas term, obtained a rule nisi accordingly, and also for a new trial, on the ground that the evidence objected to ought not to have been received, and that the finding of the jury on the third and fourth points was against evidence.

Sir *J. Campbell A. G.*, *R. V. Richards* and *Carey* shewed cause (a). The plaintiff has no right to enter the verdict for himself unless he shews that he is entitled to the whole 3900*l.* claimed; he cannot recover on the quantum meruit. To shew that he is entitled to this sum, he must establish it to be a reasonable fine: but the jury have found that it is excessive. The jury answered the first question in his favour, viz. that by the custom of this manor an arbitrary fine, which is now always understood to mean a fine of not more than two years' improved value, is payable on admission to a copyhold of inheritance; but they negatived any custom for calculating the fine payable on the admission of joint tenants. The plaintiff therefore must contend that he is entitled, as a pure matter of law, independently of custom and reasonableness, to the fine claimed.

The jury could have come to no other conclusion than that there was no custom to calculate the fine on the prin-

(a) In Easter term (May 1), before Lord *Denman C. J.*, *Littledale*, *Patteson* and *Coleridge Js.*

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ciples contended for by the plaintiff, for it appears that in some cases the practice, on the admission of joint tenants to other estates within the manor, has been to take on each succeeding life an aliquot portion of the original sum; and the plaintiff has already sued these very defendants for a fine calculated on that principle (a). And the fines which have been paid on former admissions to the estate of which the defendants are trustees, shew that the principle on which he now relies has no foundation. In 1763, 151*l.* was the fine paid on the admission of nine new trustees: in 1783 450*l.* was paid on the admission of twelve new trustees. Now it is clear, if on each successive life half of the sum is to be taken that was paid on the preceding life, or, in other words, if on each additional life double the sum is to be given that would be payable on the life next below it in the series, that instead of 450*l.* a much larger sum would have been payable on twelve lives, ascending in geometrical progression from the sum of 151*l.*, taken on nine lives in 1763, as 302*l.* for the tenth life, 604*l.* for the eleventh, 1208*l.* for the twelfth,—amounting to an aggregate sum of 2265*l.* The same inconsistency with the proposed principle of calculation is shewn by other entries in the court rolls. The highest fine ever taken was 579*l.*, in 1801, on an admission of ten new trustees.

There being then no custom in the present case, is there any rule of law which entitles the plaintiff to the fine now demanded? Even if there were any general rule of law, to support the plaintiff's principle of calculation in the case of joint tenants, it cannot apply to the present case, where the lives are nominated by the lord out of a particular class of persons, being copyholders and resident within the manor, and being of a competent age to discharge the duties of charity trustees, and where the lord is entitled to a further fine on the dropping of the worst lives out of the number, whether by death or resignation. It is unnecessary to refer to the cases establishing that the admission of the tenant

(a) See *Wilson v. Hoare*, 2 B. & Ad. 350.

for life is the admission of the remainder-man. In *Doe d. Whitbread v. Jenney* (a), it was held that a remainder-man coming into possession on the death of tenant for life was bound to be admitted and pay a fine, but that was by the custom of the particular manor; accordingly in *Phypers v. Eburn* (b), where there was no such custom, it was held that the lord was entitled to no fine from the remainder-man, and *The Dean of Ely v. Caldecot* (c) is another authority for the same point. If that rule prevails with regard to tenants who take successively, *à fortiori*, it applies to joint tenants who constitute but one tenant. There seem to be no authorities on the amount of fine payable by joint tenants on admission; in *The Earl of Bath v. Abney* (d), the subject is only incidentally mentioned, for the question was whether any fine at all was payable by the executor of a termor, and not whether its amount was properly calculated. In that case there was a *special custom* to take one and a half year's value for one life, two and a quarter year's value for two lives, and for three lives half as much more. In *Rex v. The Lord of the Manor of Bonsall* (e), this Court was of opinion that coparceners were entitled to be admitted as one heir, and on payment of the fees payable by a single heir, and made absolute a rule for a mandamus to admit them. With regard to the opinion of this Court, expressed after a former trial of this case (f), that the fine assessed according to the principle now contended for by the plaintiff was proper, the opinion was unnecessary on the decision, and was pronounced by the Exchequer Chamber (g) to be erroneous, on the ground that a deduction was to be made at all events in respect of the tenure being not for nine lives absolute, but for nine out of fourteen. As the plaintiff consents to a deduction on that ground, the objection

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(a) 5 East, 522.

(b) 3 Bing. N. C. 250.

(c) 8 Bing. 439.

(d) 1 Burr. 206.

(e) 3 B. &amp; C. 173; S.C. 4 D. &amp; R. 825.

(f) *Wilson v. Hoare*, 2 B. & Ad. 350; and see the history of this case stated *post* in the judgment.(g) Not reported, see the judgment *post*.

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which prevailed in the Court of Exchequer Chamber is now removed, but it is not to be inferred that there was no other objection to the fine, in the opinion of that Court, for it was unnecessary so to argue the case. It was enough to rely on one objection which proved fatal; no use therefore can be made by the plaintiff of that decision. There can be no rule of law by which the plaintiff can demand more than the full fine on one life, together with such additional compensation as the additional value, if any, of an estate held for the nine worst lives out of fourteen, under all the circumstances of this case, may be thought to entitle him to.

The third question left to the jury was, whether there was any custom for a former tenant, who is re-admitted, to pay no fine. The jury negatived such a custom. On the dropping, therefore, of nine lives out of these fourteen, and on a re-admission of the five remaining trustees as joint tenants with those who may be newly admitted, there is no custom to restrain the lord from assessing a fine on the re-admission of the old trustees as well as on the admission of new trustees, and commencing with 2000*l.* on the first of the fourteen, as in the present instance. It was contended at the trial (and the deduction was calculated on that footing), that the lord in such a case would take no fine on re-admitting the old trustees, but that the fine would commence on the sixth life, with 62*l.* 10*s.*, being the sixth term in the series. But, if the present claim is allowed, there is neither any rule of law nor any special custom so to limit any future claim. The only cases in support of such a custom in the manor were cases of husband and wife, who are not joint tenants.

Lastly, it was correctly left to the jury to say whether the fine was reasonable, and they have come to a right conclusion with regard to the peculiar circumstances of this estate, which excludes the possibility of applying to it any definite rule of law. In *Jackman v. Hoddesdon* (a) it is said "a wilful refusal to pay a fine is a forfeiture, if the fine

(a) *Cro. Eliz.* 351.

demand by the lord be reasonable, where the fine is arbitrable at his will, and the jury is to try whether it be reasonable or not." What rule of law could be applied to a case like the present? The lord does not necessarily appoint new trustees as soon as there are nine vacancies, and indeed it is his interest not to do so, as is shewn by this very case. [Lord Denman C. J. Would it not be the duty of the trustees to apply to him, and could he take advantage of his own wrong, if he did not put in fresh lives at their request?] It is for the lord to ascertain whether he has a tenant, and to nominate the new lives, and if he has been guilty of laches in not completing the number of trustees at the time when they were reduced to five, he has no right to a larger fine than would have been then payable. The entries, too, of the fines paid on former admissions make it probable that he never did receive any larger fine than he would have had, if vacancies had been filled up as soon as they amounted to nine, for the amount of fine has been progressively increasing from the first, which the increasing value of the property will account for, and it has not varied according to the number of trustees admitted.

They then contended that according to the facts of the case, viz. that the trustees were nominated by the lord, &c. that the finding of the jury that the fine was excessive ought not to be disturbed.

*D. Pollock and Scriven contra.* The judgments of this Court and of the Exchequer Chamber together furnish a rule for assessing this fine, except as to the quantum of deduction to be made in respect of the lives nominated not being nine specified lives, but nine out of fourteen. Every other point in this case has been disposed of by the two Courts. [Several passages were then read from a MS. report of the case in the Exchequer Chamber, shewing that the quantum of deduction on the ground above mentioned was considered both by the Court and the counsel to be the only remaining point. *Little Dale J.* Even if it be admitted that the fine is rightly calculated to some extent, still the ques-

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tion arises, according to the decree of the Court of Chancery, is it not the duty of the lord to renew as soon as the lives are reduced to five, and whether therefore, under the present circumstances, he can take advantage of his own default and charge a fine on all the fourteen lives? It seems to be a general principle of copyhold law that so long as one tenant remains to the lord he cannot compel an admission by seizing the estate, [Lord Denman C. J. The original grant in this case says nothing as to who is to nominate the lives; the difficulty is created by the decree in Chancery.] The lord cannot be supposed to be cognisant of the state of the trust, the trustees may be dispersed in different parts of the country; it is for the interests of the trust to pay as small a fine as possible, and it is, therefore, the duty of the trustees to give notice to the lord as soon as nine lives have dropped. But, at all events, this point, with all the other circumstances of the case, was before this Court, when they laid down the rule by which the fine is calculated on the admission of all the fourteen lives. [Paterson J. It appears from the report of that case to have been stated, on moving for the rule, that the object was rather to obtain the opinion of the Court as to the principle upon which the fine should be calculated on the admission of future trustees, than to succeed in that action; still it may be contended that what we have done was extra-judicial. When this case afterwards came before me at nisi prius I acted on the rule laid down by us, thinking it decisive. I was asked to engraft upon it the allowance to be made on account of the tenure not being for nine specified lives. I should have thought that had nothing to do with the question; but, of course, I feel bound by the decision of the Exchequer Chamber.] Every other point in this case has been clearly decided in favour of the plaintiff, and in sequence of the decision in the Exchequer Chamber the plaintiff has made an allowance, which it appears is times as much as was proper. They then contended that the allowance as to the value of the lives in the case should not have been admitted; that whether the fine was reasonable

matter of law ; and that the finding of the jury both on that and the preceding question was contrary to the evidence.

*Cur. adv. vult.*

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Lord DENMAN C. J. now delivered the judgment of the Court:—This long pending case has at length found its termination. It was an action for a fine of 3900*l.* due to the lord of the manor of Hampstead in respect of the admission of fourteen persons, joint trustees of a charity, to a copyhold estate within the manor.

This estate was granted near 150 years ago : new trustees are directed under a decree of the Court of Chancery, of a date not much later, to be successively appointed by the lord, subject to the approbation of a master in chancery, and whenever nine should have dropped, nine new ones were to be in like manner nominated and approved, to complete the number. It happened that all the fourteen were removed by death or resignation, and the whole number of fourteen was admitted.

The lord claimed a fine of upwards of 5000*l.*, calculated on the principle of two years' value for the first life, one year's value for the second, one-third of the same amount for the third, and so downwards. My brother *Parke* tried the cause, and, thinking the fine so calculated unreasonable, directed a nonsuit. Lord *Tenterden* and the Court agreed in his opinion ; but being much pressed, and (as they certainly understood) by both parties, to lay down a rule for making the calculation, they took time for consideration, and then pronounced the rule. It was this ; that the fine on the first life should be 2000*l.*, double the admitted yearly value of 1000*l.*, that on the second the half of that sum, or the single yearly value ; that on the third, the half of that last amount, or 500*l.* ; thus always halving the last addition to the fine in a descending series. This was on the ordinary principle that an arbitrary fine means a reasonable fine, and that such is the correct legal method of estimating a

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reasonable fine. A second action having been brought for this amount of fine, my brother *Patteson* on the trial laid down this rule, and directed a verdict accordingly. But the defendants were still dissatisfied, and took the case by bill of exceptions to the Exchequer Chamber, on the ground that the learned judge had refused to direct the jury that the fine ought to be reduced, by the consideration that the renewal was to be not on the dropping of nine specified lives, but on the dropping of nine out of fourteen specified lives, and would therefore occur sooner. There was but little discussion, but *Tindal* C. J. and Lord *Lyndhurst* C. B. both expressed an opinion that a reduction ought to have been made on the ground suggested, and the plaintiff appears to have acquiesced in it, and to have left the Court persuaded that he had its authority for claiming the fine so estimated as in 2 B. & Ad. 350, and so reduced, as reasonable in point of law. A venire de novo was then awarded, and the case came before me at nisi prius. Very different reports were brought from the opposite sides of what had occurred in the court of error; a new difficulty was started by the defendants, who recovered a verdict for want of plaintiff's shewing himself to be thus entitled under any custom of the manor, and because the jury found the fine to be unreasonable. The Court, however, thought that the case did not turn upon the custom, and that the question as to the reasonableness of the fine was not for the jury, and a new trial was granted. On this fourth trial Mr. *Pollock* rested the plaintiff's case on the law as propounded by my brother *Parke* and this Court in the first instance, as qualified by what was afterwards introduced into it in the Exchequer Chamber. He gave some evidence of a custom, where a second life was added, to exact half of the fine that had been paid the first: but the instances were not numerous, they pro- but little as to any number of tenants admitted at once, on the whole laid so slender a foundation for a custom, we can by no means condemn the verdict finding that was no proof of such custom. The plaintiff, however

to prove what deduction ought to be made in re-  
to the renewal being on the dropping of nine lives  
fourteen, and not of nine specified lives, and having  
shed his point by undisputed evidence claimed the  
t for a fine of somewhat lower amount as a necessary  
quence of law. The defendants were allowed to give  
ce, subject to what the Court should decide on its  
ability, that that fine would be in fact unreasonable  
he lord's privilege of naming the lives, and the pro-  
y that for that reason, and on account of the necessity  
rity trustees being persons of mature age, the lives  
fall more frequently than if they had been nominated  
grantees. This issue of fact the jury also found for  
lants, but the plaintiff contended that it was imma-  
and had leave to move that a verdict should be entered  
favour.

are of opinion that this must now be done. The  
al grant by the lord must be considered as if it had  
nade and accepted by the trustees on the terms after-  
prescribed by the decree in Chancery. Whenever  
plied for a renewal, they would have to pay an ar-  
, that is, a reasonable fine. We agree with the deci-  
f this Court, that a reasonable fine is to be calculated  
number of lives, by beginning with two years im-  
l value and halving it, and then halving the half of it,  
on in a geometrical series, by which means the fine  
ver equal four years improved value. Whether we  
or not with the Exchequer Chamber that the reduc-  
dopted by that Court ought to be made is immaterial  
present purpose, since plaintiff is contented to re-  
t on that principle.

Rule absolute to enter the verdict  
for the plaintiff.

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## DOE v. WRIGHT.

*Saturday,  
June 22nd.*

In trespass for mesne profits by *John Doe*, the declaration (of 1837) laid an expulsion of the 10th July, 1826, continued to the commencement of the action.

Pleas: 1. Denial of plaintiff's possession; 2. *Liberum tene-*

*mentum*. Replication, by way of estoppel, that ejectment had been brought for

the same premises on two demises to the plaintiff, one of the 10th July, 1826, for 14 years, the other of the 26th Dec.

1831, for 7 years, with a single ouster on the 27th Dec. 1831, and that the plaintiff had judgment to recover his terms. Re-

joinder, that a writ of error was pending on the judgment. Held, 1. That the judgment as

set out in the replication estopped the defendant from pleading the above pleas; 2. That its effect was not avoided by the rejoinder.

*Quære* what damages the plaintiff was entitled to recover, as it did not appear that he had been in possession after the recovery by ejectment.

A plea of *lib. ten.* to an action of trespass gives implied colour, for it admits a possession sufficient as against a wrong-doer.

**TRESPASS** for mesne profits. (Writ of the 6th February, 1837.) The declaration (of the 13th June, 1837) complained of an entry by the defendant into the lands of the manor of Hornby, belonging to the plaintiff, on the 10th July, 1826, and also into the tithes of the said manor; also into the lands of the manor of Tatham, and into the rectory of the parish of Tatham, and the tithes within the said parish, and into divers other lands; and of his keeping the plaintiff out of possession, and taking the profits of the several premises from the day and year last mentioned until the commencement of this suit.

Pleas—1. That the plaintiff was not possessed of the said manors, rectory, tithes, lands, and premises in the declaration mentioned, or of any part thereof, *modo et formâ*. Conclusion to the country.

3. That the said manors, lands and premises now are, and during all the time in the declaration mentioned were, the close, soil and freehold of the defendant; wherefore the defendant, &c. as he lawfully might, &c. Verification.

4. As to the tithes, that they, during all the said time, were the freehold of the defendant. Verification.

Replication to the first plea. That the defendant ought not to be admitted to plead the said plea, because, after the said 10th July, 1826, in the declaration mentioned, to wit, in Trinity term, the 2nd *Will.* 4, in the Court of Queen's Bench, the defendant in this suit was attached to answer the plaintiff in this suit; wherefore the defendant, with force and arms, &c. broke and entered into the manor of Hornby and the tithes thereof, and also into the manor of Tatham and the rectory and tithes of the said parish of Tatham, and also into certain other premises, which one

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*Tatham* had demised to the plaintiff for a term which had not then expired. And also wherefore the defendant, with force and arms, broke and entered into a certain other manor, to wit, the manor of Hornby and the tithes thereof; and also into a certain other manor, to wit, the manor of Tatham, and a certain other rectory, to wit, the rectory of the parish of Tatham, and the tithes thereof, and also into certain other premises. And thereupon the plaintiff complained that whereas the said *Tatham*, on the 10th July, 1826, demised the said manors, rectory and tenements first above mentioned, to the plaintiff, from the day and year aforesaid, for the term of fourteen years then next ensuing. And whereas also the said *Tatham*, on the 26th December, 1831, demised the said manors, rectory and tenements, secondly above mentioned, to the plaintiff, from the 25th December then last past, for the term of seven years then next ensuing; by virtue of which several demises the plaintiff entered into the said several tenements, and was possessed thereof for the said several terms respectively. Yet while the plaintiff was so possessed, the defendant afterwards, on the 27th December, 1831, with force and arms, &c. broke and entered the said tenements and upon the possession of the plaintiff, his said several terms therein and each of those terms being at the time of the said complaint unexpired, and ejected the plaintiff out of his said farms, &c. The replication then proceeded to state that the defendant pleaded not guilty, on which issue was joined, and that on the 6th August, the 7th *Will.* 4, the issue was tried at the Lancashire assizes, when a verdict was found for the plaintiff; and that afterwards, on the 11th November, 1836, in Michaelmas term, the plaintiff, by the judgment of the said Court, recovered his said several terms aforesaid then yet to come of and in the said several tenements. Averment, that the said manor of Hornby, lands and tithes, and that the said manor of Tatham, lands, rectory and tithes, and also the other premises in the declaration above mentioned, and in respect of which the plaintiff now complaineth, &c. are respectively the same with the said manors, lands, tithes,

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rectories and premises mentioned in the said recovery, &c.  
Prayer of judgment if the defendant, during the said term  
in the said declaration mentioned, ought to be admitted to  
the said plea, contrary to the said recovery, record and  
proceedings.

The like replication to the third and fourth pleas.  
Rejoinder to the first replication. That the defendant  
ought to be admitted to plead, because heretofore, to wit,

on the 2nd (a) November, 1836, a writ of error was duly is-  
sued, &c. for removing a transcript of the said record, in  
the said replication mentioned, to the Exchequer Chamber,  
which said writ, on the said 2nd November, was duly al-  
lowed, and was a supersedeas to all writs of execution in  
the said judgment. That no writ of execution ever at any  
time issued upon the said judgment, nor was the plaintiff  
ever in possession of the premises in the declaration and  
replication to the first plea mentioned, or of any part there-  
of. That the record was duly certified in a transcript an-  
nexed to the said writ, and duly delivered in the Exchequer  
Chamber, and that the said writ, at the time of the com-  
mencement of this suit, was in the Exchequer Chamber  
duly deposited, &c. and in full force and effect, and the pro-  
ceedings thereon pending and undetermined. That after  
the commencement of this suit, to wit, on the 13th (a) June,  
1837, the said judgment was affirmed. That thereupon, to  
wit, on the 12th (a) June, 1837, a writ of error duly issued,  
&c. whereby the said record was directed to be sent to the  
House of Lords. That the said writ on the same day was  
duly allowed, and was a supersedeas to all writs of execu-  
tion upon the said judgment. That the record was affor-  
wards, to wit, on the 26th June aforesaid, duly certified  
&c. That the said last-mentioned writ of error is now  
full force and effect, and the proceedings thereon pending  
and undetermined. Verification, and prayer of judgment  
that the defendant ought to be admitted to plead his  
first plea.

The like rejoinders to the other replication.

(a) Sic on the pleadings. See *Somerville v. White*, 5 East

General demurrer to the rejoinders, and joinder in demurrer.

The case was argued at the sittings after Hilary term last (a).

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*Creswell*, for the plaintiff. The first question is, whether this replication by way of estoppel is good. The rejoinder attempts to avoid the estoppel; but it is difficult to understand how there can be an answer to an estoppel: the replication must either be an estoppel or not. *Nares v. Lewis* (b), in the Common Pleas, and affirmed on error, is a distinct authority that the judgment recovered in ejectment estops the defendant from pleading the present pleas. The report of that case in *Richardson* has been compared with the record in the treasury of the Court, and has been found quite correct. The action was trespass, to recover mesne profits from the 2nd October, 32 *Car. 2*, to the 4th March, 35 *Car. 2*: the defendant pleaded not guilty as to part, and, as to the residue, that long before the plaintiff had any thing in the tenements last mentioned one *E. L.* was seised of them in fee, and, being so seised, before the time in which, &c. devised them to *E. L.*, now the wife of the Earl of *Huntingdon*, and *M. L.*, deceased, late the wife of the Earl of *Scarsdale*, and to their heirs for ever, and afterwards died seised; that the devisees after his death, on the 24th January, in the 32nd year aforesaid, entered and were seised by virtue of the devise, and, being so seised, married, one the Earl of *Huntingdon*, and the other the Earl of *Scarsdale*. Colour was then given to the plaintiff's entry, viz. that he, claiming the tenements by colour of a certain deed of feoffment to him and his heirs thereof made by the devisor before the day of making the said testament, when nothing of the said tenements ever passed into the possession of the plaintiff by the said deed, after the death

First point:  
Judgment  
recovered in  
ejectment may  
be replied as  
an estoppel to  
pleas of libe-  
rum tenemen-  
tum, and not  
possessed, in  
an action for  
mesne profits.

(a) Feb. 1st, before Lord Denman C. J., *Littledale, Williams and Coleridge* Js.

(b) 2 *Richardson's Practice of C. P.* 440, 4th ed. and *Brownl. Ent.* 493.

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of the devisor, to wit, on the 24th January, in the 32nd year aforesaid, entered into the tenements. The plea then stated that upon the possession of the plaintiff, the defendant, under the command of the Earl of *H.* and the Earl of *S.*, on the same 24th January re-entered and expelled the plaintiff, and the profits of the same tenements from thence, for all the residue of the time mentioned in the declaration, received, as she well might, &c. &c. The plaintiff replied, as an estoppel, that after the time laid for the trespass in the declaration, to wit, in Hilary term the 32nd & 33rd *Car. 2.*, the plaintiff, as lessee of certain persons, under a demise and entry thereon from the 1st October in 32nd *Car. 2.*, for five years, for entering upon his possession on the said 1st October, brought ejectment against the defendant and several others, who pleaded not guilty; that the plaintiff recovered judgment for his term, and that the premises in the action of ejectment were the same as in the subsequent action of trespass for mesne profits. The defendant rejoined that the said earls, in right of their wives, were, on the said 24th January, and continually until the said 4th March, seised of the premises in fee, and that the defendant entered as their servant, &c. To this rejoinder there was a demurrer; and judgment, after several continuances, was given for the plaintiff.

The only difference between that case and the present is, that there express colour was given to the plaintiff, and that here the plea of *liberum tenementum* gives implied colour only; but for the purposes of the present question the cases are identical. The extent to which former judgments operate as estoppels, is illustrated by Lord *Ellenborough* C.J., in *Outram v. Morewood* (a). It was there decided that if a verdict be found on any fact or title, distinctly put in issue in an action of trespass, and judgment be given accordingly, such judgment may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. What is the

(a) 3 East, 346.

question which the defendant seeks to raise by his pleas? Whether *Doe*, the plaintiff, on a certain day was lawfully possessed of certain premises. But it has already been determined, by the action of ejectment, that he was so possessed. No instance can be found where a judgment in ejectment has been replied as an estoppel to a defence in an action like the present, and has not been held conclusive. In *Trevivan v. Lawrance* (a), which was ejectment upon the demise of *R. V.*, a special verdict was found, viz. that *S. R.* was seised in fee of the lands in question, and that, being so, *H. M.* recovered judgment against him in debt in *Michaelmas* term, 1656, which the jury found in hæc verba; that in Hilary term, 13 *Will. 3*, the lessor of the plaintiff, as administrator of the said *H. M.*, sued a scire facias, reciting the judgment as of Trinity term, against the tertendants of the lands which the said *S. R.* had on the day of the judgment recovered, or at any time afterwards; that the tertendants (of which the defendant was one) appeared and pleaded *nul tiel record*, and issue joined thereupon; that the record of the judgment of *Michaelmas* term was produced, and judgment given *quod habetur tale recordum*, and execution awarded; that, thereupon, the plaintiff sued out an elegit, upon which an inquisition was taken, and the lands in question extended; and, for the variance between the judgment recited in the scire facias and that given in evidence, the jury doubted. The Court held that the defendants were estopped by this judgment in the scire facias to say that there was no judgment in Trinity term, because that matter had been tried against them, and the defendants were concluded to falsify the judgment on the point tried; and several strong instances of estoppel are afterwards added by way of illustration. [Lord *Denman* C.J. Perhaps it will be better to consider at once how far the pendency of a writ of error, to reverse the judgment on which the plaintiff relies, affects the question.]

It has been distinctly held that the pendency of a writ of

(a) 1 Salk. 276.

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error is not pleadable in bar to an action on a judgment; 18 *Edw.* 4, p. 6, pl. 53, where the judgment, till reversed, is said to stand in *suo robore*; nor is it pleadable in abatement to a scire facias to revive a judgment; *Dighton v. Granvil* (a), where it is said "it has been held that a writ of error pending was a good plea in abatement to such a scire facias. But of late days that has been overruled." If the writ cannot be pleaded in abatement to scire facias, *à fortiori* it cannot be pleaded in bar, as indeed was held in *Snook v. Maltock* (b). The decisions on this point, in cases of scire facias, apply with greater force to actions on the judgment, for scire facias issues for the very purpose of knowing why execution should not issue. In *Tonford v. ———* (c), application was made to stay the action of trespass for mesne profits, on the ground of error pending as to the judgment in ejectment, and was refused. *Vin. Abr. Supersedeas*, B. pl. 10 and 12, are to the same effect. It is clear from *Meriton v. Stevens* (d), *Taswell v. Stone* (e), *Kempland v. Macauley* (f), and *Donford v. Ellys* (g), in which two last cases the Court refused to interfere, that it is only by the practice of the Court, and under special circumstances, that the allowance of a writ of error is ever suffered to suspend execution; and a matter of practice cannot be pleaded. If the defendant succeed in reversing the judgment, the Court would then interfere summarily in his favour, or he might obtain relief by *auditâ querelâ*, if execution had already issued against him.

Another point made in the rejoinders is, that the plaintiff has never had execution on his judgment, and has never been in possession of the premises stated in the declaration and replication. But many cases may be put where a party would be entitled to recover mesne profits, although he has no title at all to have a writ of possession executed. Suppose a tenant *pur autre vie* to recover judgment in

(a) 4 Mod. 247.

(b) 5 A. &amp; E. 239; S. C. 6 N. &amp; M. 703.

(c) Comb. 455.


(d) Willes, 271.

(e) 4 Bur. 2454.

(f) 4 T. R. 436.

(g) 12 Mod. 138.

ejectment, and his cestui que vie to die the day after judgment, the plaintiff would have no right to take out execution on his judgment, because his title had expired, but he would be still entitled to his mesne profits. In the old action of ejectione firmæ, where a party recovered possession and damages, it was held by Warburton J., in *Peto v. Checy* (a), "though that the term determine, hanging the writ, this shall not abate the action, but the plaintiff shall recover damages." So also is 7 *Edw.* 4, 6 B, adopted in *Bro. Abr. Quare ejecit*, pt. 2, fol. 167 a, pl. 6. In *Thrustout d. Turner v. Grey* (b), acted on in *Doe d. Morgan v. Bluck* (c), the lessor of the plaintiff claimed as tenant for life, and on affidavit of his death it was moved that all proceedings might be stayed; but the Court refused the application, saying, "Though the possession cannot be obtained, yet the plaintiff has a right to proceed for damages and costs." The same is the law in an action of waste. "If an action of waste be brought against tenant pur terme d'auter vie, and, hanging the writ, cesty que vie dyeth, the writ shall not abate, but the plaintife shall recover damages only, because if cesty que vie had died before any action brought, the lessor might have an action of waste for the damages. So if an ejectione firmæ be brought, and the term incurreth hanging the action, yet the action shall proceed for damages only, because an ejectione doth lye after the terme for damages only:" *Co. Lit.* 285 a, and *Com. Dig.* Abatement (H. 56).

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*Wightman*, contra. It would be very strange if a judgment, which may be reversed on error, should be allowed to operate as an estoppel while the writ of error is pending. The case of *Dighton v. Granvil* (d) is very unsatisfactory, the decision itself is certainly favourable to the plaintiff, but all the reasoning of the Court is against the decision. A verdict is not evidence without likewise producing a copy


Second point.

(a) *Brownl. & Goldes.* pt. 2,  
 p. 128.

(b) 2 *Str.* 1056.

(c) 3 *Camp.* 447.

(d) 4 *Mod.* 247.

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of the judgment founded on it, because the judgment *may* have been arrested or a new trial granted; *Bull. N. P.* 234. Why then should a judgment be conclusive evidence, although it appears on the record that the judgment actually is questioned? The pendency of a writ of error certainly affects a judgment for some purposes. Bail cannot be fixed while the writ is pending; *Sampson v. Brown*(a); and a sheriff executing a fi. fa. after notice of the allowance of a writ of error is liable in trespass, although there has been no further supersedeas of the execution; *Belshaw v. Marshall*(b). The last case was an action of trespass against the sheriff, who justified under a fi. fa.; if the argument for the plaintiff is correct, the replication in that case, setting up the pendency of a writ of error, was bad, and the rule for arresting the judgment ought to have been granted. The present question does not arise on an action on the judgment itself. Such actions may have been allowed while a writ of error was pending, for the reason given in *Dighton v. Granvil*(c), that at common law there could be no scire facias on a judgment. *Snook v. Mattock*(d) is distinguishable, for the only object of the proceeding there was to put a new party on the record, so as to enable the plaintiff, in the event of the judgment being affirmed, to make it available against the executor of the plaintiff, who was dead. Here the object is to estop the defendant by making the judgment in a different action conclusive against him, although that judgment is under review. But *Curling v. Innes*(e) seems to be decisive against such a position. *Curling* sued *Innes* on a bond conditioned for the payment of such a sum of money as *Curling* should recover against *Beckford*. *Innes*, who was under terms to plead issuably, admitting that judgment had been obtained against *Beckford* for the sum claimed, pleaded that error was pending on the judgment. A rule was granted to shew cause why the plea

(a) 2 East, 439.

(d) 5 A. & E. 239; S. C. 6 N.

(b) 4 B. & Ad. 336; S. C. 1 N. & M. 689.

& M. 783.

(e) 2 H. Bl. 372.

(c) 4 Mod. 247.

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should not be withdrawn, as being no issuable plea, but was afterwards discharged, on the ground that the surety could not be liable till the money was actually recovered against the principal in the former action, and that, while the writ of error was depending, the money was not actually recovered. There the plaintiff sought to recover against the surety because he had recovered against the principal, but was held to be premature; and so is the present plaintiff in seeking to recover in an action for mesne profits before he has consummated his recovery in the ejectment. In the cases where summary applications have been made to stay execution while error was pending the general issue was pleaded, and the remedy by such applications was the speediest. Here no such application can be made, for the action is not on the judgment, but is collateral. As to the defendant's remedy by *auditâ querelâ*, manifest injustice would arise if he were left to it. The plaintiff is *John Doe*, and, as there is no consent rule in the action for mesne profits, if the defendant is left to his *auditâ querelâ*, the plaintiff may give his lessor the whole damages and costs, and, when the judgment is reversed, the defendant must look for redress to *John Doe*. If the Courts on motion recognize the effect of a writ of error upon a judgment, why may the same thing not be pleaded? The rule followed by the Courts is something more than a rule of practice, and two cases have been cited in which it has been established in pleading. The judgment might be an estoppel if error were not pending, but the rejoinder shews that it does not exist as an estoppel, and this the defendant is at liberty to shew. "A man may take averment which stands with the record, and which does not impugn any thing appearing within the record, and which is only as to the operation of it."—*Vin. Abr. (Estoppel, A. 12.)* citing 4 Rep. 71.

But, passing by the rejoinder, the defendant is entitled to judgment on the rest of the pleadings for the replications are bad. The declaration is the ordinary declaration

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of trespass quare clausum fregit; there is no intimation of a recovery of the same premises in ejectment, or that this action relates in any way to such a former action. So far the ordinary pleas are applicable, and are *prima facie* good. The plaintiff replies his recovery in ejectment as an estoppel. How is the plea of *liberum tenementum* affected by a replication that the plaintiff has had judgment to recover his term in the premises; or how can a demise ever be replied as an estoppel to such a plea? The estoppel must be something inconsistent with the plea, but this replication and plea may stand together. The interests of the plaintiff and defendant may both be derived under the same deed; the plaintiff and his lessor may have both been termors under the defendant. The judgment in ejectment decides nothing as to the freehold, but merely gives a title to recover possession, without prejudice to the right as it may afterwards appear between the parties; *Taylor v. Horde* (a). Even in an action of ejectment the former judgment would be no estoppel. [*Littledale J.* Suppose a special plea were necessary in ejectment, that the defendant pleaded *liberum tenementum*, that the plaintiff recovered, and that then the defendant brought another ejectment?] The judgment might be conclusive in that form of pleading. [*Coleridge J.* Your plea of *liberum tenementum* is inconsistent with the plaintiff's right of possession.] Then the plaintiff should have replied in confession and avoidance. If the declaration had been on the judgment the plea would be bad. The replication sets up a recovery of two terms, one for seven years commencing in 1831, and the estoppel is pleaded for the whole period of fourteen years, yet the ouster in the ejectment is in 1831. The present action is for keeping out of possession from 1826; how is the defendant estopped from saying that from 1826 to 1831 the plaintiff had no title? The replica therefore is an answer to part only of the plea, and is bad in part and bad altogether. Again, the judgment is

(a) 1 Burr. 114.

replication is to recover two manors of *Hornby*; the present action is for a trespass to one manor of *Hornby*. Yet it is averred that the premises in the two actions are the same. It is clear that the estoppel is in no respect ad idem.

The plea of not possessed is also good, for the judgment in ejectment merely gave the right of possession; and, as the whole record shews that the plaintiff has not executed a writ of possession, and has not possession de facto, the defendant cannot be estopped from saying that the plaintiff has not such a possession as to be able to bring trespass. The same remark applies also to the replication to this plea as to the former replication, viz. that the estoppel is too large, and answers only part of the plea. In *Aslin v. Parkin* (a) it was said that the action of ejectment is to be considered as brought by the lessor of the plaintiff against the tenant in possession; it should appear therefore, in order to make the judgment in ejectment available, that the present action is brought at the instance of the same person who was the plaintiff's lessor in the ejectment. It is said in that case that the tenant cannot controvert the lessor's possession, but that must be understood of his right of possession. No consent rule appears on the record in this case, so that the lessor's possession is not admitted. In the action for mesne profits, proof that a writ of possession has been executed is an ordinary part of the plaintiff's case. In *Calvert v. Horsfall* (b) this proof was dispensed with, under special circumstances, it having been shewn that the plaintiff had been let into possession by the act of the defendant, *Fenwick v. Grosvenor* (c), though not in point, may be referred to generally by way of illustration. In *Doe v. Huddart* (d) it seems to have been thrown out by the Court that the judgment in ejectment would in an action for mesne profits be an estoppel, if pleaded. That, however, was a mere dictum; the point decided was that it was not conclusive evidence, although a writ of possession had been executed.

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(a) 2 Burr. 665.

(c) 1 Salk. 258.

(b) 4 Esp. 167.

(d) 2 C., M. &amp; R. 316.

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In the case cited from *Richardson's Practice* (a), which is mainly relied on for the plaintiff, the pleadings were different, the plea was seisin in fee giving colour, and the title claimed by the defendant and by the plaintiff respectively were brought into direct conflict in point of time; and the grounds of the judgment do not appear.

*Cresswell* in reply. The case of *Belshaw v. Marshall* (b), which has been cited to shew that the allowance of a writ of error may be set up in pleading as an answer to the judgment, proves merely this, that the allowance of the writ and notice thereof to the sheriff is a supersedeas of execution, and that he will proceed to levy under a fi. fa. at his peril. In *Curling v. Innes* (c) the plaintiff could not be damnified, until he had failed in recovering the fruits of his judgment against *Beckford*, and therefore it was clear that he sued *Innes* prematurely. In *Reynolds v. Beerling* (d) a judgment obtained against the plaintiff was pleaded as a set-off, and the replication that error was pending on that judgment was held bad. The *auditâ querelâ*, which, it is said, will be so inefficacious to the defendant if he should be driven to it, is pronounced in 2 Wms. Sand. 148, n.(1), to be of an equitable character, of the most remedial nature, and to have been invented lest in any case there should be a defect of justice, and the defendant would have his *auditâ querelâ* against the real plaintiff, and not against *John Doe*. The reason why a verdict is not evidence, viz. that judgment may be arrested, cannot, of course, be applied to derogate from the effect of a judgment itself where every step is completed by the party obtaining and steps must be taken adversely to prevent its being effectual.

It was not necessary that the plaintiff should have set out a writ of *habere facias possessionem* on his judgment; if he had done so, the writ would certainly have been

(a) Of C. P. p. 440, 4th ed.

(c) 2 H. Bl. 372.

(b) 4 B. & Ad. 336; S.C. 1 N. & M. 689.

(d) In note to *Evans v. . .*  
 3 T. R. 188.

back, so as to be conclusive in favour of the plaintiff's title during the whole time of the demise stated in the declaration in ejectment. If it were necessary that the writ should be first sued out, it never could have been decided that a party might bring trespass for mesne profits after his title was gone. There is in this record a statement of the declaration in ejectment, that *John Doe* entered under the leases and that the defendant turned him out. If the plea of not guilty in that case operated as a denial of that fact, it has been found for the plaintiff; if the plea admitted the fact, that also is sufficient for the plaintiff. In order to maintain this action, it is not necessary that, at the time of commencing it, the plaintiff should have had possession, but simply at the time of the alleged trespass.

The plea of *liberum tenementum* is just as inadmissible in this case, after the judgment in ejectment, as was the plea of seisin in fee, in the case cited from *Richardson*. Both pleas give colour, or they would be bad. The colour given is something short of that which enables the plaintiff to maintain his action, for if they admitted a good title, there could be no defence: *Radford v. Harbyn* (a). What colour is given by the plea of *liberum tenementum*? It admits that the plaintiff has such a possession as would enable him to maintain an action against a mere wrongdoer, such as was the action of *Graham v. Peat* (b), but it denies that he has a right to such a possession as, in the very case last cited, is adverted to as being necessary to support ejectment. That denial is inconsistent with the judgment set up as an estoppel; and without such a denial the plea is good for nothing. The doctrine of giving colour is discussed at large in *Dr. Leyfield's* case (c). If the record in ejectment had been expanded in the present declaration, the plea in question might have been demurred to, and the estoppel need not have been replied, as it would appear on the record. Thus, in *Kemp v. Goodal* (d), where *Speake's*

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(a) Cro. Jac. 122.

v. *Durant*, 8 T. R. 406.(b) 1 East, 244. And see *Dodd v. Kyffin*, 7 T. R. 354, and *Argent*

(c) 10 Rep. 88.

(d) 1 Salk. 277.

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case (a) is cited, it was held that, where nil habuit was pleaded to debt for rent upon an indenture, the plaintiff might demur, as the estoppel appeared on the record. *Co. Lit.* 303, and *Palmer v. Ekins* (b), are also authorities for this point. [*Littledale J.* 'The plea is *primâ facie* good: should you not have replied your estoppel to so much only as it would apply to?'] The estoppel does not *reply* anything; it says that defendant cannot plead his plea. The plaintiff is in the same situation as if he had declared on the judgment and demurred to the plea. If the plea is bad in part, it is bad altogether. In *Jefferies v. Dyson* (c), which was trespass for mesne profits, the plaintiff offered in evidence a recovery in ejectment against the casual ejector, upon which no writ of possession had issued, and relied upon the judgment to estop the defendant from going into title. It was held that this would have been an estoppel if the then defendant had been made defendant in the ejectment.

As to pleading an estoppel, he referred to *Doe v. Huddart* (d), *Vooght v. Winch* (e), *Pleadal's case* (f), as cited in *Cro. Eliz.* 36, and *M'Grath v. Hardy* (g).

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an action for mesne profits: the declaration of the 13th of June, 1837, was in the common form; it laid an entry on the manors of Hornby and Tatham, and other premises, and expulsion on the 10th July, 1826, the latter continued to the commencement of the action. Several pleas were pleaded: two only it will now be necessary to consider. The first denied the plaintiff's possession; the third pleaded liberum tenementum of the defendant during all the time in the declaration mentioned. To each

(a) Hob. 206.

(b) 2 Str. 817.

(c) 2 Str. 960.


(d) 2 C., M. & R. 316.

(e) 2 B. & Ald. 662.

(f) Moore, 96.

(g) 4 Bing. N. C. 782.

of these pleas the plaintiff, by way of estoppel, replied the proceedings in an action of ejectment, brought by the plaintiff on the demise of *Sandford Tatham* against the defendant. Two demises were laid, on the 10th July, 1826, for fourteen years, and on the 26th December, 1831, for seven years, with a single ouster on the 27th December, 1831. The plea of not guilty, the verdict and the recovery by judgment of the two terms were then stated, with an allegation that the judgment was still in full force; and the replications having alleged the identity of the premises so recovered, with those mentioned in this declaration, conclude with praying judgment, "if the defendant, during the said terms in the said record mentioned, ought to be admitted to the said plea, contrary to the said recovery, record and proceedings."

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The validity of this replication of estoppel was questioned, First point. independently of the rejoinder, and may be conveniently disposed of first. With regard to both pleas, that which denied the plaintiff's possession, and that which asserted the defendant's freehold, the question will be whether it discloses that those pleas seek to draw again into controversy the very point (or right) decided in the former suit: if they do, upon the plainest principles it concludes the defendant from pleading them, and this principle was not denied in the able argument for the defendant, but only its application to the present record.

1st. As to the plea which denied the plaintiff's possession. Two terms, it was said, are shewn to have been recovered in the ejectment, one commencing 10th July, 1826, for fourteen years, and one on the 26th December, 1831, for seven; the ouster is laid on the 27th December, 1831, and no possession appears to have been given under the judgment; but the judgment itself in ejectment does not give the possession, only the right to it by entry, or writ of habere facias possessionem; the plea therefore and the replication are not inconsistent, and it appears by the whole record that the plaintiff has not in fact the possession.

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This reasoning we think is not sound; the plea, being pleaded to the whole declaration, must be taken, on the assumption of its being a good plea, to deny any such possession in the plaintiff as was necessary for his bringing the action at all. But, in order to bring the action, all that could be necessary, on the strictest construction, would be a possession, when the alleged trespass was committed; that, therefore, at least must be taken to be denied by the plea. But the record in ejectment shews conclusively, as between these parties, a lease of the 10th of June, 1826, and a continuing possession till the ouster in December, 1831. The plea therefore and the replication are clearly inconsistent, and the former seeks to re-agitate that very question which the latter shews to have been determined in the former action. The defendant's argument, indeed, proceeded on the assumption that it was necessary for the plaintiff to have actual possession at the time of bringing *this action*; and there are, no doubt, old authorities, not cited in the argument, which shew that the disseisee could not bring trespass with a continuando after the disseisin before re-entry; because the freehold was in the disseisor for the whole time after the disseisin, but that after re-entry he should have trespass with a continuando from the disseisin to the re-entry. But the same authorities state that for the *first* trespass and disseisin the action lay before re-entry; and they give several instances where the disseisee had lost his re-entry by the act of God, or the determination of his estate, in which he had the action without re-entry; see *Co. Litt.* 257 a, and 2 *Roll's Abr.* 550—553 and 554. It seems to us, however, not important now to follow out this inquiry, because the question is not to what extent the plaintiff can recover damages on this record, as to which we say nothing, but whether the plea of not possessed must not at all events include the time at which the trespass charged was committed. We think it must, and therefore, being inconsistent to that extent at least with the judgment set out in the replication, the defendant is estopped from pleading it. It

was urged, indeed, that viewing the replication in this way, it was open to another objection, that it did not extend so widely as the plea, because, although the plea might refer to the time of the cause of action accruing, it also refers to the time of the commencement of the action, and as to this last, the replication shewing no re-entry was no estoppel. But we think this objection received a sufficient answer at the bar. The plea is pleaded to the whole, and it is enough for the plaintiff to shew that it cannot be pleadable to that. The first plea therefore seems to us to be sufficiently answered.

2dly. In support of the second plea, it was said that there was nothing inconsistent in the allegation of the freehold being in the defendant, with the recovery of a term for years by the plaintiff; for it may be, for example, that both the plaintiff and his lessor are termors under the defendant. In order to estimate the weight of this argument, it is necessary to settle what is the true meaning of liberum tenementum, what it admits and what it denies. Now, as it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would be bad as amounting to the general issue; it must admit such a possession as would suffice to maintain the action, if unanswered, or as against a wrong-doer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action; in the language of pleading it gives implied colour to the plaintiff, but asserts a freehold in the defendant with a right to immediate possession. In an ordinary case therefore such a plea is answered by replying a term of years in the plaintiff created by the defendant, which shews that the plaintiff's possession is not merely colourable but rightful; or, where the declaration has been sufficiently explicit, by taking issue on the liberum tenementum, and so shewing the defendant to be a wrong-doer. Now, in the present case, the replication shews that, as between these parties, it has been decided that the plaintiff is a termor, not indeed under the defendant, but under one whose title is paramount to his;

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that the possession therefore is a rightful one, and that the defendant has no right to immediate possession. But this is inconsistent with the limited admission of the plea, and the title set up by it taken together; and therefore we think the defendant was estopped from such plea. Mr. *Creswell* cited in support of the replications to both pleas, the case of *Nares v. Lewis*, which is to be found in 2 *Richardson's Practice* (a), 440, and *Brownlow's Entries*, 493; and he has procured us a transcript of the whole record from the Treasury, the judgment not appearing in *Brownlow*. The declaration was in trespass, and for the mesne profits. The plea set out a title in the defendant in fee, giving express colour to the plaintiff. The plaintiff replied, by way of estoppel, the proceedings in a former action of ejectione firmæ against the defendant and others, in which judgment had passed for him to recover his term in the same premises, but, as in the present case, the replication said nothing of any re-entry or delivery of possession. The rejoinder maintained the title in the plea, to which there was a general demurrer; and, after several continuances, it appears that judgment passed for the plaintiff. Substituting a freehold for a fee simple, this case is precisely the same as the present, as far as regards the point already considered, and is an authority in support of our opinion.

Second point. The replications being good by way of estoppel, the remaining question is, whether the rejoinders avail to destroy their effect, and these allege the pendency of a writ of error on the original judgment in the House of Lords, and we are clearly of opinion against the defendant on this point. The authority cited by Mr. *Creswell* from the Year Book of 18 *Edw.* 4, p. 6, pl. 33, is very direct and satisfactory; and to this and other cases cited at the bar may be added those of *Taswell v. Stone* (b) and *Benwell v. Black* (c), because they illustrate the distinction taken between the mere maintenance of the action on a judgment pending a writ of


(a) Of the Common Pleas, 4th ed. (c) 3 T. R. 643.

(b) 4 Burr. 2455.

error to reverse it, and the proceeding to execution upon a judgment recovered in such second action; in the former case, the Court being clear that there was no reason to set aside the judgment, but thinking it highly proper to stay any proceeding to execution upon it.

Upon the whole, therefore, we give judgment for the plaintiff.

Judgment for the plaintiff.

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IN THE EXCHEQUER CHAMBER,

BEFORE

TINDAL C. J.

ALDERSON B.

VAUGHAN J.

GURNEY B.

PARKE B.

COLTMAN J.

BOSANQUET J.

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HUMPHERY v. The QUEEN.

*Tuesday,  
 June 4th.*

**ERROR** from the Queen's Bench. See the pleadings set out at length, 3 *Nev. & Perr.* 681. The case was argued in Hilary vacation last (Feb. 4th).

Sir *J. Campbell* A. G., for the plaintiff in error. The question simply is, whether the words of the 9 *Geo.* 4, c. 17, s. 2, requiring every person elected to certain offices to make a declaration "within one calendar month next before or upon his admission," mean, that a person may make the declaration *after* he has been admitted. The Court below have decided shortly that the declaration is not a condition precedent to being admitted. But, if that is so, it follows that the declaration need never be made, for the Annual Indemnity Act would cure the omission, and the corporations of the country may be filled with Jews, Mahometans, or Pagans. The intention of the legislature, however, in

A party elected to a corporate office must make the declaration required by the 9 *Geo.* 4, c. 17, s. 2, to be made "within one calendar month next before or upon his admission," *before* he can claim to be admitted; and if he refuse to make the declaration, the election is void.

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passing the 9 *Geo.* 4, c. 17, must be looked at, and it is clear from the terms of that statute, that in relaxing the penalties against Roman Catholics and Dissenters it was not intended that any but Christians should be admitted to offices of trust in this country. The importance attached by the legislature to this declaration is manifest from this that in the Municipal Corporation Act, 5 & 6 *Will.* 4, c. 76, an express clause is introduced (sect. 50), requiring this declaration still to be taken. And when Mr. *Salomons*, who now claims the office of alderman, was elected a sheriff of London, but was unable to make the declaration on the ground of his religious opinions, the 5 & 6 *Will.* 4, c. 28, was passed, to exclude sheriffs from the provision. That act however was very unnecessary, if the construction to be contended for to-day is the true one. It is submitted that the usage, set out in the plea, of the court of mayor and aldermen requiring a person, seeking to be admitted, to make the declaration, is a valid one, and that, on the refusal to make the declaration the election was void, and a fresh precept properly issued. It is further contended, that the judgment of the Court below is erroneous on two grounds; first, that, even if the administering the oath of office is tantamount to admission, still, before admission, the declaration must be made, and if there is an omission or neglect the election is void; second, that the making of the declaration is of itself part of the ceremony of admission, which is not consummated merely by taking the oaths of office. The ceremony consists of three parts: 1. taking the oath of allegiance; 2. the oath of office; 3. making the declaration. It is competent to the court of mayor and aldermen to direct in what order these acts shall be performed, and Mr. *Salomons*, having refused to make the declaration at the time when it was proposed to him, must be considered as having refused entirely. It is material to see how the law stood before the passing the 9 *Geo.* 4, c. 17. Now by the 13 *Car.* 2, st. 2, c. 1, s. 12, it is clear that no one could lawfully fill any of the offices specified without having taken the sacrament according to the rites of the church of Eng-

land within one year before his election. From the nature of that test it could not be contemporaneous with the admission, but the policy of the legislature is apparent to admit none but members of the church of England to corporate offices. Then the 25 *Car. 2*, c. 2, s. 2, required the oaths of office to be taken in the next term after admittance to the office (extended by 9 *Geo. 2*, c. 26, s. 3, to six months), and the sacrament according to the church of England was to be taken within three months after admittance. By these acts therefore it was secured that none but members of the church of England should fill the various offices of trust in the kingdom; and by the Indemnity Acts, which have passed annually for the last century, a further time to take the sacrament &c. was allowed, which by their retrospective effect avoided all penalties incurred. Then on looking at the 9 *Geo. 4*, c. 17, it is manifest that the act was passed merely to repeal so much of the former acts as required the sacrament to be taken, according to the *rites of the church of England*; but, in order to maintain the Protestant church of this country and Scotland respectively, a declaration was “*substituted in lieu*” of the sacramental test. Sections 2, 3, and 4, provide for the declaration to be made as an antecedent test before admission, similar to the provisions of 13 *Car. 2*, st. 2, c. 1, and sections 5 and 6 provide for a declaration to be made after admission similar to 25 *Car. 2*, c. 2. It has been shewn that under 13 *Car. 2*, st. 2, no one but a member of the church of England could be elected to a corporate office; it would, therefore, be bungling legislation if, under 9 *Geo. 2*, c. 17, a person could be admitted without making the declaration. It may be admitted that the language used is not so precise as is desirable, but the act must be construed according to the intention of the legislature, which is apparent, and the act being in *pari materiâ* with the former ones, effect must be given to it *cy près*. The construction contended for on the other side is, that “upon admission” means “after admission;” but, where the legislature intended the declaration

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to be made after admission, as in section 5, very different language is used, and, if the construction were correct, two declarations would be made after admission, which seems absurd. It is said that the duties of the court of mayor and aldermen are merely ministerial, viz. to administer oaths; but it is clearly their duty also to see the law enforced, and they could not know whether the party was qualified except by putting questions. By the old corporation law it was competent to any elector to ascertain the qualification of a candidate, as appears by *Rex v. Hawkins (a)*; now that duty devolves upon the persons making the admission. It is objected that, as the section requires the declaration "within one calendar month next *before* or *upon* admission," both words cannot mean "before," but the construction is, that the declaration may be made one month before the party claims to be admitted, but *must* at all events be made before admission. It is true there are many cases where *upon* means *after*, but there are many also where it means *before* the act done; the object therefore must in all cases be looked at. If a new trial is to be granted upon payment of costs, it means that the payment of costs is to precede the new trial. So if there were a law that a man should take his seat in the House of Commons upon taking an oath, the oath must be taken first. So, if upon voting, it were required he should take an oath, as in the Catholic Relief Bill, 10 Geo. 4, c. 7, s. 2, the oath must precede the vote. [Alderson B. Suppose an act required that a party should, before or upon his examination in open Court, take an oath to speak the truth, might the oath be taken after examination?] That is another pointed example. Suppose also a covenant by a man to make a settlement *upon* marriage, and the settlement made after marriage, and a creditor to file a bill to set it aside as a voluntary conveyance, would it be an answer that the settler had covenanted to make the settlement *upon* marriage? [Alderson B. The true construction probably is, that it neither means before nor after,

(a) 10 East, 211.

but concurrently with.] That construction is sufficient for the plaintiff in error. Then it is objected that the proceedings of the mayor and aldermen were premature, that Mr. *Salomons* had at all events a month within which to make the declaration. But section 4 enacts that, on omission or neglect to make the declaration, the election should be void. This objection therefore resolves itself into the former. Where once a party has refused to make the declaration, it was not intended that a *locus penitentiae* should be afforded him. Suppose the day after he had been elected he was admitted, and had then refused to make the declaration, can it be contended that that refusal would not make the election void?

2. The making the declaration is part of the ceremony of the admission. *Johnson* defines "admittance?" "allowance or permission to enter." But before the party is suffered to enter, he must comply with the legal formalities imposed by the persons admitting him. When an attorney is admitted in the courts of common law, two oaths are administered: could he claim to prescribe the order in which the oaths should be taken? Suppose, in the present case, six aldermen had been to be elected: could each of them have dictated the order and time for making the declaration, and could all of them have had the whole sitting of the court to make or retract a refusal? What hardship can there be in holding that a vacancy is created at the instant a refusal is made? The party knows what declaration the law requires; if he is not a Christian, it is not to be expected that a few days or hours for deliberation will enable him to conform. The question therefore really is, whether the court of mayor and aldermen or the candidate is to decide which act shall precede the other, the declaration or the admission. If he is not prepared to make the declaration, then the legislature excludes him.

Sir *F. Pollock*, contra. These acts of parliament all contain restrictions unknown to the common law, and there-

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fore must be construed strictly. It cannot be contended that, because the repealed acts were more stringent, a wide construction must be given to the present statute. As it abridges the rights of the subject, the case must be brought clearly within its provisions. Great fear seems felt lest a Jew should be elected lord mayor or alderman, but it is clear, under section 5 of 9 Geo. 4, c. 17, that he may be lord chancellor, or lord treasurer, at least for six months. Section 5 enacts that any person who *shall be admitted* to certain offices shall, within six months after admission, make a declaration; it is clear therefore that such persons need not make the declaration before admission, for the argument adduced from the annual Indemnity Act is not legitimate, viz. that such persons ought to make the declaration before admission, and that their omission to do so is cured by the Indemnity Act. It is an invalid argument for this reason—it is not competent to conclude that, because there always has been an Annual Act, there always will be. The provision in section 5 therefore must be taken as it stands. It is true that *In the matter of Steavenson* (a) the Court decided that an act of indemnity is to be construed prospectively. But, whether that decision be good law or not, the present act cannot be soundly construed on the assumption that an annual indemnity act will always pass. Great stress is laid on the words enacting that the declaration shall be *substituted in lieu of* the sacramental test; but it does not follow that the former acts are to be pursued *in omnibus*. The object of the Test and Corporation Acts was to secure the party being a member of the church of England; that of the declaration, merely to guard against attacks on the church of England. Section 4 enacts, that “if any person placed, elected or chosen in any of the said offices shall omit or neglect to make the declaration, such placing, election or choice shall be void.” It does not enact that the admission shall be void; because the word “placed” seems to be equivalent to the word “admitted,” as appears by the

(a) 2 B. & C. 34.

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preamble to 13 *Car.* 2, st. 2, c. 1, where “placing” and “removing” are opposed to one another: therefore it is contemplated that there should be an admission without the declaration, and that then the subsequent omission should disqualify. [*Tindal* C. J. The word “placed” describes those officers appointed by the crown, such as recorders, &c., and distinguishes them from those elected by the corporate body. *Alderson* B. In section 13 of 13 *Car.* 2, the word “placed” is contradistinguished from “admission,” and in section 9 the commissioners are authorized to place certain parties in the corporate offices, who are afterwards to take the oaths: if a corporation were dissolved, and the crown were to appoint new corporate officers, that would be a placing, the admission would come afterwards.] The word “placed” in the preamble clearly does not refer to such a case. Then upon section 2 of 9 *Geo.* 4, the words only require “the declaration upon admission”; but the question is, what right have the mayor and aldermen to require the declaration to be made, and to declare the election void? If *Mr. Salomons* had come at any other time within a calendar month to make the declaration, could he be said to have omitted or neglected? [*Tindal* C. J. The argument on the other side is, that *Mr. Salomons* might have made the declaration at any time within a month before he came up to be admitted; you say that he had a month absolute in which to make it?] Yes. It is not necessary to lay down the course the Court ought to have adopted, it is sufficient to shew that they were wrong in declaring the election void. *Mr. Salomons* presented himself to be admitted; if he broke any bye-laws of the court, he subjected himself to the penalties; that was all. The duties of the mayor and aldermen were merely ministerial, and, if after admission *Mr. Salomons* had omitted to make the declaration, then his election would have become void. The word *upon* never means *before*. In *Dr. Johnson*, thirty definitions of the word are given, not one of which is *before*. The instance cited by the Attorney-

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General makes against him—a new trial granted *upon* payment of costs, means, that the new trial is to be *after* the payment of costs; so where the law enacts a man is to be hanged, or a reward to be paid, *upon* conviction, it is clear that *upon* means *after*. [*Tindal* C. J. The cases you are putting are where the consideration is stated on which a thing is to be done, as where a fine is to be paid by a copyholder *upon* admission, in which case it was held that the fine was not to be paid till *after* admittance, but that depended on its being the consideration; here it is contended to be a condition precedent.] That assumes the whole question. But how can it be said there has been a refusal by Mr. *Salomons*? Suppose when he was asked to make the declaration he required time, and the court offered to adjourn, if he would pledge his honour to state to them at the subsequent meeting whether he would make the declaration or not, and he declined to give the pledge, would this be a refusal? Yet this is what actually occurred. At what moment of time is it contended that the election was void; at the time he first declined to make the declaration? But suppose that he had afterwards and at the same court tendered his willingness to make it? [*Alderson* B. It does not appear but that the declaring the election void was the last act of the court.] The question is, whether the election was void at the time the precept was ordered to issue. [*Parke* B. It is the duty of the mayor to issue the precept when there is a vacancy, no judgment of the court is required as in the case of *Rex v. Johnson*(a).] The whole question is, had the court of mayor and aldermen power to require the declaration to be made. In a penal statute like the present, a strict construction will be put upon the disabling clauses; and *The Margate Pier Company v. Hannam*(b) is a strong authority to shew that the Court will not construe the word “void” in an act of this sort absolutely.

(a) 5 A. &amp; E. 488; S. C. 6 N. &amp; M. 870.

(b) 3 B. &amp; Ald. 266.

Sir J. Campbell A. G. replied.

*Cur. adv. vult.*

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TINDAL C. J. now delivered the judgment of the Court.—  
In this case the Court of Queen's Bench gave judgment in favour of the crown upon a quo warranto information, filed against the defendant for exercising the office of alderman of the ward of Aldgate, in the city of London. The pleadings raise the question on demurrer, whether, at the time of issuing the precept by virtue of which the defendant below was elected alderman, the office was void, by reason of Mr. Salomons, who had been elected alderman of that ward, upon a vacancy by death, having neglected to comply with the provisions of 9 Geo. 4, c. 17, s. 2.

Mr. Salomons had not made and subscribed the declaration required by that act before he tendered himself to the court of mayor and aldermen for admission into the office of alderman; and upon his so tendering himself, as it is averred in the plea, "the said David Salomons was then and there requested by the said court of mayor and aldermen to make and subscribe in their presence the said declaration in the said act mentioned; but the said David Salomons did not nor would at the said court of mayor and aldermen, so holden as last aforesaid, nor at any time within one calendar month next before or upon his admission into the said office of alderman, nor at any other time whatsoever, make and subscribe the said declaration, but wholly omitted and refused so to do."

The replication does not traverse this omission and neglect, but states the special circumstances, viz. that within the space of one month next after the day of his election he presented himself to the court of mayor and aldermen, and demanded and made claim to be admitted; and that the Court demanded of him whether he had signed the declaration required by the said act within the space of one month next before his then application for admission; to which he answered that he had not; "whereupon the Court demanded of him whether he would make and subscribe

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the said declaration; whereupon the said *David Salomons* declined to say whether he would or not, but required the said court to admit him to the said office, which the said court then and there, and within the space of one month from the election of the said *David Salomons* to the said office of alderman, positively refused to do, and the said court then and there declared the election of the said *David Salomons* to the said office to be null and void."

Upon this state of the pleadings the Court is bound to assume that he omitted to make and subscribe the declaration at the time when the court required him to do so; because the allegation in the plea that he did so omit and neglect is not traversed, and it is ingeniously alleged in the replication, that he would not say whether he would do so or not after he should be admitted. And the question therefore becomes this, whether, by reason of such omission and neglect, Mr. *Salomon's* election became void; which question depends upon the construction which must be put upon the act of parliament as to the time at which the declaration required by the statute must be subscribed and made.

The 9 Geo. 4, c. 17, after referring in the first section to the acts usually called the Corporation and Test Acts, and reciting the expediency of repealing so much of them as imposes the necessity of taking the sacrament of the Lord's Supper according to the rites and usage of the church of England, proceeds to repeal such parts of the said acts. The 2d section, after reciting that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline and government thereof, and the Protestant Presbyterian Church of Scotland, and the doctrine, discipline and government thereof, are, by the laws of this realm, severally established permanently and inviolably, and that it was just and fitting, on the repeal of such parts of the said acts as impose the necessity of taking the sacrament as a qualification for office, that a declaration, which is afterwards set forth, *should be substituted in lieu thereof*, proceeds to

enact, "That every person who shall hereafter be placed, elected or chosen, in or to the office of mayor, alderman, &c., or in or to any office of magistracy, or place, trust, or employment, relating to the government of any city, &c. within England, Wales, or the town of Berwick-upon-Tweed, shall, *within one calendar month next before or upon his admission* into any of the aforesaid offices or trusts, make and subscribe the declaration" therein set forth.

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The 3d section specifies in the presence of what persons the said declaration shall be made and subscribed; and the 4th enacts that "if any person placed, elected or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected or placed."

It is clear from these recitals and provisions that the legislature meant to open as well corporate offices as places in the gift and appointment of the crown to every person professing the Christian faith, instead of confining them, as before had been the case, to those only who were willing to take the sacramental test; but it is equally clear that it intended that no one should exercise such an office, unless he made and subscribed, at the proper time, the declaration which is substituted instead of such sacramental test: and the only difficulty which is raised upon this record is, whether the proper time had arrived for holding the election of Mr. *Salomons* to be void, when he was required by the court of mayor and aldermen to make and subscribe the declaration prescribed by the act, and when he omitted and neglected so to do.

And we are all of opinion that, upon the proper construction of the act, such time had then arrived, and that the non-compliance of Mr. *Salomons* with such requisition of the court made his election to the office of alderman *ipso facto* void.

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Upon two points, which have been made in the course of the argument on the part of the crown, we have entertained no doubt. We think it clear that the statute did not intend by the 2d section to give the period of one entire month to the person elected, within which he might decide whether he would make the declaration or not; and that the objection, that one month had not elapsed in this case between the election of Mr. Salomons and the application to be admitted, is entirely without foundation. The statute never could anticipate that any one would offer himself as a candidate for the office, who had not already made up his mind to subscribe the declaration imposed by law; and the plain object of the provision contained in the 3d section appears to us to be, that if at the time of being admitted the person elected has already made the declaration so recently as within one month next before (but not at an anterior period), such making of the declaration shall be sufficient, and he cannot be called upon to make it again. Neither have we any doubt upon another point, which was raised in the course of argument, namely, that the legislature did not intend to give to the person elected a reasonable time *after* admission for the purpose of making the declaration; for, in the first place, such are not the words of the act; nor could the legislature have ever contemplated that the propriety of making or not making the declaration was a subject which required any time for consideration. The words of the act, "upon his admission," do not, as it appears to us, mean *after* the admission has taken place, but *upon the occasion of*, or *at the time of*, his admission; the words of that section shew the intention of the legislature to have been that the space of time, commencing at the distance of one calendar month next before, and terminating with the act of admission, should be the limit or period within which the declaration was required to be made; so that, if not made at an earlier time, the latest opportunity of making it would be at the same time and place at which the oath of office was administered, and be-

fore the same persons; in effect, the making of the declaration does, by virtue of those words, form a part of the act of admission, and is an essential requisite to the being permitted to exercise the corporate office; and we hold it therefore to be unnecessary to refer to instances of the legal meaning of the word "upon," which in different cases may undoubtedly either mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation with reference to the context and the subject-matter of the enactment. And consequently if, *immediately after* having been admitted in the same way as if this act had not been passed, Mr. *Salomons* had omitted and neglected to make the declaration, his election would unquestionably have been void, and it would have been the duty of the court of mayor and aldermen to have forthwith issued a precept for a new election.

But the point upon which the doubt, and the only doubt, in this case has arisen in our minds is, whether upon the strict interpretation of the wording of the act the election became void by the mere offer of the party elected to be admitted at the proper time when he ought to have been elected and admitted, and by his omission or neglect at that time to make and subscribe the declaration required; or whether, as no admission had actually taken place in the old corporate form, that is, by taking the oath of office, the occasion had arisen upon which he was bound to make the declaration, and the court had the power to declare the election to be void.

It seems, however, to us that the more reasonable construction of the act, and the construction which will best effectuate the intentions of the legislature is, that, if the person elected (not having qualified within the preceding month by making the declaration) be not ready (and much more if he decline to say whether he will so do or not) to make and subscribe the declaration, as well as take the corporate oaths, at the time and place when his admission

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ought to take place, according to the charter, by-law, or usage, of the corporation, no complete or valid admission can take place at all; his admission could be at most but an idle form, since he cannot be permitted, under section 4, "to do any act in the execution of his office," and that his election thereby becomes void. The declaration comes in lieu of the sacramental test, which in the case of corporate offices must have been taken not only before the admission, but even before the election of the party; it is a test of the required qualification for the office, both as indicating the religious faith of the party, and furnishing a security by his solemn promise against any injury to the Protestant church and its establishments. And, as the precise order in which each part of the act of admission is to take place is not defined by the statute, it is reasonable to hold, where there is any doubt as to which should precede the other, that the court of mayor and aldermen, being the proper court to give the admission, may prescribe the order in which the respective parts of the admission shall be arranged; that they may first ascertain the qualification before they administer the oath of office; instead of adopting the course which might be useless, and which if useless would be improper and might even lead to inconvenience, viz. that of first administering the oath and afterwards ascertaining the qualification. There is no reason, therefore, why the admission by the corporate oath of office should first take place, before the statutory declaration is made, but the contrary; as thereby this great inconvenience would follow, that the time during which the corporation remains without an officer must be unnecessarily extended.

And we think this construction is entirely consistent with the words of the statute. The 2d section is framed upon the supposition that the party elected will be completely admitted, and requires that he make the declaration either within a given time before, or at the time and on the occasion of his admission, superadding a new requisite to the old corporate form of admission. It is the 4th section which pro-

vides for the consequences of omission or neglect to make that declaration. It enacts that, if the person elected shall omit or neglect to make and subscribe the said declaration *in manner above mentioned*, such placing, election or choice, shall be void. The question, therefore, upon the words of this section is—what is the proper meaning of the general words of reference, “in manner above mentioned?” And, coupling those words with the context, we think we are not bound to say that they mean at the time when a corporate admission has been completed, when it is clear from the context that an actual admission cannot be an available admission unless the declaration is made, and that the person elected cannot, without such declaration made, exercise any corporate functions. It is also not unworthy of observation that the words of the 4th section do not, in terms, provide that that *admission* shall be void, but the *election* only (for the word “placing” has no reference to admission, but only to appointment or title, by any other mode than election or choice); and it can scarcely be conceived that, if an actual admission had been contemplated, the legislature would not have declared such admission to be void by the refusal or omission to make the declaration.

Upon the whole, therefore, we hold the meaning of the statute to be that it makes void the election, if the person elected (not having previously qualified within a calendar month) should omit or neglect to qualify himself by making the declaration at the time and occasion when he ought to be admitted, and that the useless form of a corporate admission is not necessary before the party can be called on to qualify according to the statute, and before the election can by law be declared to be void.

We therefore think that the judgment of the Court of Queen’s Bench ought to be reversed.

Judgment reversed.

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Monday,  
December 2d.

CHARLES RISHTON v. NESBIT.

NESBIT v. CHARLES RISHTON.

1. Error lies in the Exchequer Chamber on a judgment of the Court of Queen's Bench in error from the Common Pleas at Lancaster.

2. Where the tenant demurred specially to a count in a writ of right, and on nil dicit by the demandant, entered up final judgment, viz. that the demandant be in mercy, &c. and he the tenant hold the tenements quit of the demandant and his heirs for ever, the Court of King's Bench, on a writ of error from the Common Pleas, Lancaster, reversed so much of the judgment below, as adjudged that the tenant should hold the tenements quit of the demandant and his heirs, for ever, no issue having been joined; and the Court of Exchequer Chamber affirmed the decision of the King's Bench.


**ERROR** on a writ of right, originally brought in the Common Pleas, Lancaster, wherein *Charles Rishton*, the demandant, claimed certain tenements through *Barbara Aytoun*, deceased, who was seised of the premises in fee, to wit, within sixty years now last past, and alleged that from the said *Barbara Aytoun*, upon her death, the right to the tenements aforesaid descended to *John Rishton*, as the second cousin and heir of the said *Barbara Aytoun*, and which said *John Rishton* was the great great grandfather of the said *Charles Rishton*, &c.

Special demurrer, setting out for cause that it did not appear in or by the said count how or in what manner the said *John Rishton* was the second cousin and heir of *Barbara Aytoun*, and that it was not expressly averred that *Barbara Aytoun* was seised in fee within sixty years then last past, but only under a videlicet.

*Rishton*, the demandant, having made no answer, judgment was entered up for the defendant as follows: it is considered that the said *Charles Rishton* and his pledges to prosecute be in mercy for his false complaint, and that the said *Nesbit* go thereof without a day &c., and the said *Nesbit* hold the tenements aforesaid, with the appurtenances, to him and his heirs quit of the said *Charles Rishton* and his heirs for ever.

Error being brought on this judgment by the plaintiff below, in the Court of King's Bench, it was argued in Michaelmas term, 1836. The following points were stated for argument by the plaintiff below: the plaintiff in error intends to argue, among other objections, first, that the judgment is bad in law and defective, in as much as it is no bar to any subsequent action which might be commenced by the demandant for the recovery of the same lands, this judgment not being for a default *after mise or issue*

*joined*; second, that the judgment is bad in law and defective because it adjudges that the tenant should hold the tenements to him and his *heirs quit of the demandant* and his heirs for ever, which part of the judgment should have been omitted as being applicable only to default after *mise* or issue joined, whereas in this cause default was made before issue joined; third, that the said judgment should merely have concluded that the demandant and his pledges be in mercy, and that the tenant go without day, &c.

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*Wightman*, for the demandant(a), cited the following authorities (b): *Fitzh.* Abr. tit. Judgment, pl. 245; *Bro.* Abr. tit. Droit de Recto, pl. 16; 9 *Vin.* Abr. tit. Droit de Recto (G); *Heidon v. Smethwick*, Goldsb. 90; *Co. Litt.* 295 b; 2 *Wms. Saund.* 44, n. (4).

*Starkie*, contra, cited the following authorities: *Bracton*, 373 b; *Dowland v. Slude*, 5 East, 290; *Flota de Narratione*, lib. vi. c. 16; *Ferrer's case*, 6 Rep. 7; *Com. Dig.* Pleader, (Y 1); *Dumday v. Hughes*, 3 B. & P. 453; *Charlwood v. Morgan*, 1 N. R. 64; *Tooth v. Boddington*, 1 Bing. 208; *Worley v. Blant*, 9 Bing. 635; *Herne v. Lilborne*, 1 Buls. 161; *Penryn's case*, 5 Rep. 85 b.

*Cur. adv. vult.*


LORD DENMAN C. J. in Hilary term, 1837, delivered the judgment of the Court.—This is a writ of error from the Court of Common Pleas at Lancaster, and the case is this: Upon demurrer to the count in a writ of right, judgment *final* was given for the tenant, viz. that he hold the tenements aforesaid to him and his heirs quit of the said *Charles Rushton* and his heirs for ever.

(a) Nov. 15th, 1837, before Lord Denman C. J., *Patteson*, *Williams* and *Coleridge* Js.

abolished by 3 & 4 *Will.* 4, c. 27, s. 36, it has been thought unnecessary to give the arguments.

(b) As writs of right have been

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For the demandant it is argued that judgment final can only be given after issue joined on the mise, for which position *Bro. Abr. tit. Droit de Recto*, pl. 16, is relied on, citing the Year Book, 26 *Hen. 8*, f. 8, pl. 6, which is in the very words given in *Brooke*, “*Nota per Fitzherbert Justice, judgment final ne serra donc in brieve de droit, mes puis le mise joine.*”

It is said on the part of the tenant that this is doubted in *Bracton*, but we cannot find any passage in *Bracton* to that effect, nor indeed any authority at all contradicting the dictum of *Fitzherbert J.* The reason is sufficiently apparent, viz. that until the tenant, by joining the mise, asserts his own right, the question as to which of the litigant parties has the greater right is not raised, and it is only upon the determination of that question by verdict, or by either party making default and abandoning it (*Penryn's case* (a)), that the judgment *final* proceeds, which judgment in terms affirms that the one party and his heirs shall hold the tenements quit of the other and his heirs, that is, adjudges that he has the greater right.

The result is, that so much of the judgment below as adjudges that the tenant hold the tenement to him and his heirs quit of the demandant and his heirs for ever must be reversed, and the rest of it affirmed.

Judgment accordingly.

A writ of error having been brought on this judgment in the Court of Exchequer Chamber, *Wightman*, in Michaelmas term, 1838, obtained a rule, calling upon the plaintiff in error to shew cause why all proceedings on the writ of error should not be quashed for irregularity.

*Starkie* shewed cause in Michaelmas vacation, 1839 (b). It is contended that the writ of error in this case ought to

(a) 5 Rep. 85 b.

*Vaughan J., Bosanquet J., Alderson*

(b) Jan. 9th, before *Tindal C. J.*, *B., Gurney B. and Coltman J.*

have gone to the House of Lords, but the words of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 8, which govern writs of error, are quite general, as section 8 enacts "that writs of error upon any judgment given by any of the said Courts" shall be returnable only in the Exchequer Chamber. *Rex v. Wright* (a) and *Trafford v. The King* (b) do not entirely govern this case, for there the writ of error was brought without any objection taken. In *Rex v. Wright* (a), *Tindal* C. J. said, "In the case of an act of parliament passed expressly for the further advancement of justice, and in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of criminal cases." If any doubt remained, it would be explained by the construction put on the 27 *Eliz.* c. 8. It was held on that statute that, where an action was originally commenced in a county palatine, a writ of error did not lie to the Exchequer Chamber, but only to the House of Lords; that however turned on the particular expressions of the statute, which are not to be found in the present act. *Ricketts v. Lewis* (c) was cited on moving for the rule, in which error was first of all brought in the King's Bench on a judgment of the Common Pleas at Westminster, and from thence was carried into the Exchequer Chamber, but the Court held that it did not lie in that Court, for the consequence would have been that the Court of Common Pleas would have been sitting in error upon its own judgment. [*Tindal* C. J. We thought the case tacitly excluded.]

*Wightman*, contra. If the argument on the other side prevails, the consequences will be to give three writs of error on every judgment from the County Palatine at Lancaster; first, to the Queen's Bench; second, to the Exchequer Chamber; and lastly, to the House of Lords. This could not have been the intention of the legislature, which

(a) 1 A. &amp; E. 434.

(c) 2 C. &amp; J. 11; S.C. 2 Tyrw.

(b) 8 Bing. 204.

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passed the 11 Geo. 4 & 1 Will. 4 to facilitate appeals.  
Before that statute it is clear there were only two appeals,  
viz. to the King's Bench and to the House of Lords; and  
it is submitted that this act applies to the three superior  
Courts at Westminster Hall only. Sect. 8 enacts "that a  
transcript of the record only shall be annexed to the return  
of the writ," "and such proceedings as may be necessary  
thereon shall be awarded by the Court in which the original  
record remains;" which is strictly applicable to the superior  
Courts only; because in writs of error from the Common  
Pleas at Lancaster only the transcript of the record is sent  
to the Queen's Bench; 1 Archb. Pr. 544 (by Chitly) 6th ed.;  
and therefore the Court of Exchequer Chamber would  
have only the transcript of a transcript. [Coltman J. I be-  
lieve in no case is the record removed, but that the tran-  
script is in contemplation of law considered the record (a).]  
*Ricketts v. Lewis* (b) is the only case in point; and the  
same reasoning applies here as there; for suppose two  
judges of the Common Pleas or of the Exchequer hap-  
pened to be judges of the Common Pleas at Lancaster,  
then if a writ of error were brought in the Exchequer  
Chamber, it would come before the same justices. [Al-  
deron B. The same thing would happen if two justices of  
the Queen's Bench were justices of the Common Pleas at  
Lancaster; therefore the argument is balanced.]

TINDAL C. J.—The words of the clause in 11 Geo. 4 &  
1 Will. 4, c. 70, s. 8, are quite general, "that writs of error  
upon any judgment given by any of the said Courts (the  
Courts before mentioned being the Queen's Bench, Com-  
mon Pleas and Exchequer,) shall hereafter be made return-  
able" in the Exchequer Chamber only; which words  
certainly large enough to comprehend judgments of every  
kind, both original judgments and those given on writ  
error in the Queen's Bench on judgments of inferior courts.

(a) See Serjt Williams' note, 2 Wms. Saund. 101, n.  
(b) 2 C. & J. 11; S.C. 2 Tyrw. 15.


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Therefore unless some serious inconvenience be pointed out which clearly could not have been contemplated by the legislature, the natural construction of these words is to include all judgments on writs of error. The first objection made is, that thereby three writs of error are made available to the purpose. I agree that this was probably not the intention of the legislature, but it is incidental to the case included in the terms of the act, and it really puts the parties suing out error into a better condition and to less expense than they were previously; for we have always been anxious to have this Court full, in order to save the expense of a further appeal to the House of Lords, and, by our so doing, appeals to that tribunal have been much diminished. The second objection is, that, as two justices of the Exchequer or of the Common Pleas may have been justices of the Common Pleas at Lancaster, a writ of error in the Exchequer Chamber would bring the case before the same judges before whom it was tried, and therefore that *Ricketts v. Lewis* (a) applies. But this is far too general an application of that case, as it would include all cases of inferior jurisdictions, where the judge who sits at the trial of the cause would also sit as a court of error if a bill of exceptions were tendered. Lastly, it is said that the late act only applies to the three superior Courts at Westminster Hall, where the original record remains, and that it is clear that it does not apply to the Common Pleas at Lancaster, where the original record remains, and from which only a transcript is brought up. The statute says that such judgment as the Court of Exchequer Chamber shall give shall be entered on the original record remaining in the court below. Where is the greater difficulty in applying it to the case of a judgment in the Common Pleas at Lancaster than to a judgment of the Common Pleas at Westminster? I think this writ of error lies, and that such a construction may be put upon the act without straining its language.

(a) 2 C. & J. 11; S. C. 2 Tyrw. 15.

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VAUGHAN J., BOSANQUET J., ALDERSON B., GURNEY B., and COLTMAN J. concurred.

Rule discharged.

The defendant joined in error, and the case was argued in Trinity vacation last (*a*), by *Starkie* for the plaintiff in error and *Wightman* for the defendant in error. The following points were stated for argument by the plaintiff in error:—

First. That the judgment in a writ of right, where default is made by the demandant after mise joined, being final, (namely, that the tenant hold the tenements sought to be recovered to him and his heirs quit of the demandant, his heirs and assigns for ever, and not merely that the demandant be in mercy for his false claim,) there appears to be no good reason for holding that a judgment by default *before* the mise is joined should not likewise be final.

Second. That this doctrine is apparent from the great strictness which the Courts have at all times observed in proceedings on a writ of right, the reason for which would fail were the judgment not a final one.

Third. That the judgment in the inferior Court of the duchy of Lancaster being a final one, it ought not to have been reversed.

TINDAL C.J. now delivered the judgment of the Court. After stating the previous proceedings, his lordship said—

The present writ of error is brought by the tenant to review the judgment of the Court of Queen's Bench: but after argument, and upon consideration, we think the judgment given by that Court is right. It is to be observed in the first place that this is not even a judgment upon demurrer where the demurrer has been joined, and both parties are before the Court. It is a judgment upon a de-

(*a*) January 9th, before *Tindal* C. J., *Vaughan* and *Bosanquet* Js., *Alderson* and *Gurney* Bs., and *Coltman* J.

murrer by the tenant, where the demandant has made default by not appearing on the day given to him to join in demurrer; so that although the law may well be that, if either party makes default at the day given, *after demurrer joined*, there shall be final judgment against him, as appears to be laid down in 6 Mod. 5, for, in that case the demurrer having been joined, the Court is bound to give judgment upon the whole record; yet here the demandant, by not joining in demurrer, makes default, and both parties are no longer before the Court; and consequently the judgment against him ought upon principle to be strictly and properly that which is given where he is nonsuited or nonprossed for any other default after the appearance of the tenant, but before any answer put in by the tenant to the Court. Now, in the case of any personal action, the judgment against the plaintiff, under these circumstances, would be that of barring him from maintaining that particular action, but not a final and perpetual bar against any other; and, so far therefore as any analogy holds, the judgment in a real action ought to be the same. And, looking at the authorities which have been brought before us, we think the weight of them is in favour of that conclusion. The authority of *Co. Litt.* 295 b, is very strong to the point, where the very reason upon which the nonsuit of the demandant in a writ of right is held to be peremptory, appears to rest on the ground that it is a nonsuit after the mise joined on the mere right; nor is the authority of *Heidon v. Smethwick* (a) less decisive. It is very difficult to reconcile all the dicta of different judges in the Year Books upon this point. *Fitzherbert's Abr.* tit. Judgment, 245, lays it down that final judgment shall not be given *but for default after the mise joined*. On the other hand, *Paston J.*, in *Bro. Abr.* tit. Nonsuit, 26, states his opinion to be, "that, if the plaintiff be nonsuited in a writ of right before appearance, judgment final shall not be given et e contrà *after appearance*." But, as we find the law held to

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the contrary by Lord Coke, in which the authority of the case in *Goldsborough* agrees, and as the law laid down by Lord Coke agrees with reason and analogy, we think that rule of law ought to prevail, and hold that the judgment of the Queen's Bench must consequently be affirmed.

Judgment affirmed.

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IN THE QUEEN'S BENCH.

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LORD HOWDEN v. Sir JOHN SIMPSON, Knt., and others (a).

By indenture between the defendants, who were shareholders in a projected railway, and the plaintiff, a peer of parliament, through whose estate the railway was to pass, it was stipulated, on the one hand, that he should withdraw his opposition to a bill

**DEBT** on covenant. The declaration stated that on the 4th May, 1836, by a certain agreement then made between the plaintiff, on the one part, and the defendants, on the other part, which said agreement, sealed &c., the plaintiff brought into Court, reciting that a Company had been formed for making a railway from the city of York to and into the township of Altofts, in the parish of Normanton, in the county of York; thence to be united with another projected railway called The North Midland Railway, and such Company so formed was called The York and North

(a) Reversed in the Exchequer error before the House of Lords. Chamber, and now pending in See the next case.

then before Parliament for making the railway according to a certain line, and, on the other hand, that they would apply, the next session, for a *deviated* line, and that, in case the bill then in Parliament for the original line should pass during the then present session, they would, within six months after its passing, pay him 5000*l.* as compensation for the damage his estate would sustain by the deviated line, without prejudice to the further compensation to be paid him in the event of the deviated line not being adopted. To a declaration in debt for the 5000*l.*, alleging that the plaintiff had withdrawn his opposition, and that the bill had passed, &c., the defendants pleaded, 1. That they had abandoned the said deviated line, and had adopted and were endeavouring to procure an act for another line, which would entirely avoid the plaintiff's estate: 2. That the agreement was made secretly, without the knowledge either of those, through whose lands the original line was to pass, or of the legislature, and was kept secret till the passing of the act, and that the plaintiff was a peer of Parliament.

Held, 1. That the first plea was no answer.

2. As to the second plea, that the concealment of this agreement from the legislature was a fraud, and that the plaintiff could not recover.

*Quare*, whether it was an answer to the action that the agreement was concealed from the other landowners on the line, or that the plaintiff was a peer of Parliament.

Midland Railway Company; and that defendants were four of the proprietors of such Company, and that a bill had been introduced into Parliament for making such railway so intended by the said Company; and the line thereof, according to such bill and the maps and plans deposited for the purposes thereof, would, for a considerable extent, pass through the estates and near the mansion and residence of the plaintiff at Kirby Wharfe and North Milford, in the West Riding of the county of York; and, as he, the plaintiff, considered the same would be a great injury and detriment to his estates, and was therefore a dissentient from such undertaking, and would oppose the passing of the said bill, that the defendants in their own individual capacities, and not merely as proprietors in the projected railway, had proposed to the plaintiff that, if he would withdraw his opposition to the bill, and assent to the said railway, they would endeavour to deviate the line proposed in the map or plan deposited for the purposes of the bill, in the manner in the agreement and recital mentioned, and that, in case the bill then in Parliament for making such railway pass into a law in the then present session of Parliament, then the defendants should be bound by the further stipulations and agreements in the agreement after contained, and plaintiff did agree that, in consideration of the stipulations and agreements in the agreement after contained being observed and performed, he, the plaintiff, did thereby withdraw his opposition to the bill, and give his assent thereto; and defendants did thereby jointly and severally covenant and agree with the plaintiff that, in case the bill then in Parliament for making the railway should be passed into a law within the then present session of Parliament, defendants, some or one of them, or the Company, should and would, within six calendar months after the act for constructing the railway according to the line in the then present bill, and the maps and plans so deposited as aforesaid, should in the then session of Parliament receive the royal assent, pay unto plaintiff

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5000*l.* as or towards compensation for the damage and detriment which the residence and estate of plaintiff would sustain from the railway passing according to such deviated line, and exclusive of and without prejudice to the further compensation to be made to the plaintiff, in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation to him or to his tenants for any damage as thereafter mentioned. Averment, that plaintiff, in pursuance of the agreement, to wit, on the day and year aforesaid, withdrew his opposition to the bill, and that it received the royal assent on the 21st June, 1836. Breach, the non-payment of the 5000*l.*, though six months had elapsed.

The first plea set out the deed on oyer, which contained the recitals and agreements referred to in the declaration. The deed set out in its margin the line to be originally proposed to Parliament and also the deviated line, and an agreement, in case the bill then in Parliament should pass during the then present session for making the railway according to the original parliamentary plan, that the defendants, in the next session of Parliament, would apply and use their best endeavours for obtaining an amended act for deviating the line of the railway, and, in case of failure, that they would pay the plaintiff such additional sum of money, over and above the 5000*l.*, for additional damage which he would sustain from the railway passing otherwise than according to the deviated line, as should be determined by arbitration. Then followed an agreement that the defendants, before using any of the plaintiff's lands, should pay him 100*l.* an acre for the same, and that they would, upon demand, fully compensate him and his tenants for all damage which might be sustained in consequence of the construction of the railway whilst the works were in progress, the amount of compensation to be settled by arbitration. The deed contained also an agreement by the defendants to do and forbear many acts for the protection of the plaintiff's property, and a proviso by which the agree-

ment was to become void in case the bill should not pass during the then present session of Parliament. The plea then alleged that after making the agreement and before the commencement of this suit, to wit, on the 1st February, 1837, the Company of proprietors of the projected railway resolved to abandon, and did altogether abandon, the deviated line set out in the agreement, and in lieu thereof did then resolve to adopt, and did then adopt, another line for their projected railway, in lieu of the deviated line mentioned in the agreement, which newly adopted line entirely misses and is altogether out of the lands of the said plaintiff and every part thereof, and that the Company, to wit, on the day and year aforesaid, presented a petition to the present Parliament to be permitted to carry the projected railway along the newly adopted line, and were then making every exertion in their power to procure an act of Parliament for carrying the projected railway along the newly adopted line, and that, if they should succeed in obtaining the act, no part of the projected railway would pass through the lands of the plaintiff or any part thereof. Verification.

Second plea: That the projected railway in the agreement mentioned, at the time of making the agreement, was intended to pass through, and, according to the act to which the royal assent was so given as in the declaration mentioned, is intended to pass through, divers lands of divers individuals, and that the agreement was made and entered into privately and secretly between the parties thereto, and without the consent or knowledge of the said individuals through whose lands the railway was intended to pass as aforesaid, and was concealed from them continually until the act was passed; and that the agreement was not disclosed to or known in or by the Parliament, in and by which the act was so passed as aforesaid, and that the same agreement was concealed from the legislature during the passing of the said act; and that the plaintiff, before and at the time of making the agreement, was, and from thence

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hitherto hath been and still is, a peer of this realm and a lord of Parliament (u). Verification.

Special demurrer to the first plea, on the ground that it does not appear by the plea whether the Company abandoned the deviated line in the agreement mentioned before or after the passing of the act of Parliament in the agreement in the said declaration mentioned; and that the abandonment of the line in the agreement mentioned affords no answer to the cause of action in the declaration mentioned; that the money stipulated to be paid by the defendants in the agreement was to be paid at all events within six months after the passing of the act, and that it is no answer that, after the agreement made and the act passed, the Company thought fit to abandon the line, &c. &c.

General demurrer to the second plea.

Joinders in demurrer.

*Cresswell*, for the plaintiff. The first plea is bad. The abandonment of the *deviated* line referred to in the agreement can be no answer to an unqualified undertaking to pay the plaintiff 5000*l.* within six months after the passing of the bill for the *original* line. The only condition precedent to the payment is the passing of that bill during the then session of Parliament. The case, on this point, is within *Pordage v. Cole* (b); there is a time specified for the payment, which is independent of any other stipulation or event, except the passing of that bill.

The second plea seeks to invalidate the plaintiff's claim on the ground, among others, that the agreement was concealed from Parliament. The same ground was taken in *The Vauxhall Bridge Company v. Earl Spencer* (c). A bill for building Vauxhall Bridge, and containing clauses for indemnifying the proprietors of Battersea Bridge, who opposed the bill in its early stages, had passed the Commons. On application to have it read a second time in the House

(a) These words were added by consent during the argument.


(b) 1 Wms. Saund. 319 h.

(c) 2 Madd. 356.

of Lords, several peers objected to parts of it, and especially to the indemnifying clauses, on the ground that such a contract was contrary to public policy, and was likely to operate as a bar to the general improvement of the country. In consequence of this objection the bill was withdrawn; but the proprietors of Battersea Bridge having declared their intention to oppose the passing of the intended act, unless a sum of money was paid to them for the withdrawal of their opposition, a sum of 5000*l.* was secured to them. This arrangement was concealed from the legislature, and in the following year the act was passed. The Vauxhall Bridge Company filed a bill in Chancery to have the security delivered up to be cancelled, and a demurrer to the bill was overruled by Sir *T. Plumer* V. C., because the agreement was illegal on the ground of public policy. Lord *Eldon* C.(a), however, was of a different opinion, and held the agreement was not illegal.

The plea further objects, that this agreement is void because Lord *Howden* is a peer of Parliament. But he does not contract to give his vote, as a peer, in favour of the railway bill, he merely contracts to assent as one of the landowners whose estate would be affected by it, and such assent must, in compliance with the standing orders, be stated and known to the House. It may be said that by this contract he disqualified himself, in some measure, from properly discharging his legislative duties, as he would have to vote on a measure in which he was personally interested. It might as well be said that he was incompetent to grant a lease, because he might afterwards, as a peer, have judicially to decide upon the construction of its terms. [Lord *Denman* C. J. Suppose Lord *Howden* had voted against the bill, could he have recovered this money?] Certainly; he is not bound by the agreement to vote at all. Lord *Petre* v. *The Eastern Counties Railway Company* (b) shews

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(a) *Vauxhall Bridge Company*  
v. *Earl Spencer*, Jac. 64.

(b) Not then reported. See the  
case in the reports of "*Railway*  
*Cases*," 462.

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that an agreement, like the present, on the part of a peer, is not illegal. A peer may be a member of a joint stock company, or he may hold bank stock, although the Bank of England has from time to time to apply to Parliament for a renewal of its charter. If the acquisition of such interests were pronounced illegal, on the ground that it tended to bring individual interest in collision with public duty, such a doctrine might affect half the members of both Lords and Commons. The agreement was certainly no fraud upon the other shareholders; *Edwards v. The Grand Junction Railway Company* (a).

The present case has been twice before a court of equity (b). The defendants filed a bill to have this agreement delivered up to be cancelled and for an injunction, and relied on the three objections which they now set up in their second plea; and Lord *Langdale* M. R. overruled a demurrer to the bill for want of equity, because he was of opinion that such an agreement to procure an act of Parliament, on a representation that one line was best and intended to be pursued, whereas it was intended to adopt another line, was a fraud upon the legislature. This was the only ground on which the Master of the Rolls proceeded, and does not amount to a distinct judgment on the point, but merely to an intimation of opinion; for his lordship concluded by saying, "I could not decide in favour of the demurrer without entertaining a clear opinion that the contract was valid; and as I think it, on the contrary, very probable that the contract will prove to be invalid, I am of opinion that on that ground the demurrer must be overruled." The case was afterwards brought before Lord *Cottenham* C. on appeal, and he evidently dissented from the opinion expressed by Lord *Langdale* on the above point, and allowed the demurrer, but on a ground unconnected with the present argument, viz. that the illegality, if any, of the agreement appeared on the face of it, and

(a) 1 Mylne &amp; Cr. 650.

(b) *Simpson v. Lord Howden*, 1 Keen, 583, and 3 Mylne & Cr. 97.

therefore that a court of equity had no jurisdiction to order it to be delivered up. This is certainly an agreement which might be entered into by any ordinary person, and there is nothing in it which is at all connected with the plaintiff's duties as a member of the legislature.

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Sir *F. Pollock*, contra. This case is not within *Pordage Cole* (a). The payment of the money is bound up with the contemplated taking of the plaintiff's land. The defendants agree to pay the 5000*l.* "as or towards compensation for the damage, &c. which the residence and estate (of the plaintiff) will sustain from the said railway passing according to such *deviated* line." These words have no meaning, if the payment is to be taken as independent of the deviated line. That line has been abandoned; the plaintiff cannot be damaged by the line now contemplated, and has no claim therefore on the defendants. If a contract were made to pay money within six months after the appointment of a person to an office, and he should die before appointment, or Parliament should abolish the office, the money would not be payable.

The secret agreement to abandon the line before Parliament and to substitute another was a fraud upon Parliament and upon the other parties interested in the railway, whether the intended act of parliament is to be considered as a public act, or simply as a private bargain sanctioned by the legislature. "The agreement," says Sir *T. Plumer* V.C., in *The Vauxhall Bridge Company v. Earl Spencer* (b), "was secretly made during the pendency of the bill in Parliament, and that secrecy is the great ground of objection to it," &c. "The object of the agreement was to prevent an opposition to the bill in Parliament, and it was to be concealed from the legislature. Such an underhand agreement was a fraud upon the legislature, and contrary to principles of public policy. The contract was invalid. It falls within the principle of the cases that have been

(a) 1 Wms. Saund. 319 b.

(b) 2 Madd. 366.

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cited." Lord *Eldon* C., when the case came before him, certainly does not appear to have agreed with all that was said in the Court below: but what was said by the Vice-Chancellor on the subject now under consideration was necessary to his decision, whereas what was said by the Chancellor on the same subject was quite immaterial to his decision, which was simply that the question should be raised in a court of law. So also in this very case, when before the courts of equity, Lord *Cottenham* C. does not judicially dissent from the ground taken by the Master of the Rolls, but, after making extra-judicial observations, which at most are only an intimation of opinion, he decides nothing, except that the question should be raised in a court of law.

The agreement was illegal also on the ground that it tended unduly to influence the plaintiff in his legislative character; and, even if such an agreement could have been legally entered into by any ordinary individual, it certainly could not by a member of Parliament. Many contracts may be made by others which peers cannot make. In *Jones v. Randall* (a) it was decided that an action lay to recover a wager, whether a decree of the Court of Chancery would be reversed on appeal to the House of Lords, but in that very case Lord *Mansfield* C. J. said, that a peer could not have recovered on such a wager. He referred also to *Gilbert v. Sykes* (b). Estate bills are always submitted to the judges to ascertain whether the proper assents have been given. It is doubtful whether a peer could give his assent to such a bill unless in the House of Lords.

*Cresswell*, in reply. As to the first plea, it is clear that the plaintiff has done every thing he agreed to do; the defendants have not done what they agreed to do. [Lord *Denman* C. J. We think that the first plea is bad.]

This agreement was not, because it was kept secret, a

(a) 1 Cowp. 37.

(b) 16 East, 150.

fraud on the other landowners. How were they affected by such secrecy? Before the bill was brought into the House they made their own agreement with the Company; and the Company cannot surely be bound to disclose, as a matter of duty, to the owner of A. how much they have given to the owner of B. for his land. When estate bills are before the judges, they do not inquire what terms the parties have made with each other. In the case of a composition with creditors the basis of the contract is that they shall share equally.

As to this agreement contemplating the substitution of another line for the line to be proposed to Parliament, a railway company is not pledged to propose the best line. For the sake of making a beginning, which is of paramount importance, they may obtain an act for one line, and then come, at a subsequent session, for a deviated line. On this point Lord Cottenham C. makes some very pointed observations on this very case, though certainly he cannot be said to have decided the present question. *The Vauxhall Bridge Company v. Earl Spencer* (a) is a much stronger case than the present, for there the public might be said to have a direct interest in having the bridge free of toll; and a similar observation applies to *Edwards v. The Grand Junction Railway Company* (b).

*Cur. adv. vult.*

Lord DENMAN C. J., in Hilary term, 1839(c), delivered the judgment of the Court.—This case was argued in the sittings after last term, upon demurrer to the pleas. The declaration sets out so much of an agreement under seal between the parties, as shewed that a bill had been introduced into Parliament for the construction of a railway, upon a line which would pass near to the mansion of the plaintiff, and which he had therefore declared his intention to oppose; that the defendants had proposed to him that, if

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(a) Jac. 64.

(c) January 31st.

(b) 1 Mylne & Cr. 650.

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he would withdraw his opposition and assent to the bill, they would endeavour to deviate the proposed line in the manner stated in the agreement, and that, in case the bill should pass in the then present session, they would be bound by the further stipulations in the agreement. The declaration then stated that, on condition of these stipulations and agreements being performed, the plaintiff did thereby withdraw his opposition and give his assent, and the defendants did thereby covenant and agree that, in case the bill should be passed in that session, they would, within six months after the passing of the act for constructing the railway according to the line *at present proposed*, pay the plaintiff 5000*l.* as compensation for the damage his residence and estates would suffer from the railway passing according to the *deviated* line, without prejudice to the *further* compensation to be made in the event of the deviated line not being ultimately adopted. It then averred the withdrawal of the plaintiff's opposition, the passing of the bill, the elapsing of the six months, and assigned a breach in the non-payment of the 5000*l.*

To this declaration, after setting the agreement out on oyer, the defendants first pleaded a plea, which we thought bad for reasons assigned during the argument.

More difficult and more important questions arise upon the second plea. This plea seeks to avoid the deed on three several grounds. 1st, That the railway, at the time of making the agreement, was, and by the bill now passed is, intended to be carried through the lands of divers individuals, and the agreement was entered into secretly without their knowledge. 2nd, That the agreement was not known to Parliament, and was concealed from the legislature during the passing of the act. And lastly, that, whatever might be the character of such an agreement if made between the defendants and any other than a peer or member of the legislature, the plaintiff's quality as a member of the Upper House, and the duties incumbent on him as

such, made it, at all events, an illegal agreement for him to enter into, and one which he cannot enforce.

This plea is demurred to generally, and it was contended in the argument that on neither of these grounds could the agreement be impeached. We think that, the plea and agreement being taken together, an answer to the declaration is disclosed, on the ground that the agreement had in contemplation that which was inconsistent with material allegations in the preamble and provisions in the clauses of the intended bill, and that to conceal such an agreement from the legislature was, in the eye of the law, a fraud upon it, and any contract founded on such concealment contrary to good faith. It is said that there is no legal fraud. Whether an agreement of this sort, apart from the accident of concealment, must be of necessity invalid of itself, we need not decide. A state of things may, perhaps, be easily imagined, in which, from new information, obtained after the first line had been applied for, it would become just as well as expedient to substitute another for it. But the question is, whether such a change can lawfully be made, during the progress of the bill, by a secret compact between the future company and certain individuals. Now the line by which a railway is to pass is at the very root of the whole project. Alter that line,—fresh notices, fresh plans, fresh consents, become necessary. Had the proposed deviation been introduced into this bill, it could not, under ordinary rules, have passed in that session. Suppose then that this agreement had been disclosed to Parliament, is it clear that the bill would have been allowed to pass in its present state? On the contrary, is it not at least equally probable that some such objection as the following might have prevailed “ You come to us for powers which you do not mean to use; you offer evidence in support of the preamble, and desire us to find it proved, when it is at the same time clear, from your own deliberate agreement, that another line is proposed and intended to be adopted by you: if you are not as yet in a condition to ask us to legislate on

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that line, it is fitting that we should suspend legislating altogether, until we can have your whole plan before us at once." Now, if it is in any degree reasonable to suppose that the legislature might have proceeded on such grounds as these, we think it clear that the agreement ought to have been disclosed, and that to conceal it was a legal fraud, because it was concealing that which might have made the decision other than it was. Acts of this kind, it is well known, are to be considered as bargains between the public and the parties applying for them, and the legislature represents the public in framing them: it is essential, therefore, that nothing be knowingly kept back, which may reasonably be expected to have an influence on the judgment of the legislature in so framing them as to secure for the public the best terms in return for those powers over private property, and other advantages, which the act is to confer on the parties applying.

Upon principle, therefore, we are of opinion that this agreement, under the circumstances of concealment disclosed by the plea, cannot be enforced. But it has been twice under the consideration of a Court of Equity, and two other cases in equity, supposed to bear upon the point, were cited in the argument. It is necessary for us, therefore, to see how the point stands upon authority.

The present defendants, it seems, filed their bill praying, among other things, that this agreement might be declared to be void, and delivered up to be cancelled, and the present plaintiff enjoined from proceeding in this action. The bill was demurred to generally for want of equity. In the argument before Lord *Langdale* the same three objections to the agreement were insisted on as this plea discloses: the judgment proceeded entirely on the second, the same which we have been considering; and upon that ground Lord *Langdale* said, "he saw very strong reasons to think, that, when the proper time came for deciding it, the contract might be considered and held to be illegal:" he there-

fore overruled the demurrer (*a*). This decision, however, was reversed, on appeal, by the Lord Chancellor (*b*), not upon grounds which impeached the reasoning or opinion of the Master of the Rolls, but upon a point which he had disposed of in a very few words, that the objections made to the agreement were all apparent on its face, and available in a court of law, and that there was no instance in which a court of equity had given relief under such circumstances. Some expressions, however, are reported to have fallen from his lordship, from which it may be probably inferred that he at that time considered the reasoning of the Master of the Rolls as inconclusive; but there is nothing which approaches even to a formed opinion on the subject.

Two other cases were cited; the first is the *Vauxhall Bridge Company v. Lord Spencer and others* (*c*), and on appeal, *Jac.* 64. The subject of discussion there was an agreement made, before the passing of the Vauxhall Bridge Act, between the projectors and the trustees of the Battersea Bridge. Clauses to indemnify the latter for losses which they might sustain by the erection of the new bridge had been introduced into the bill, but they were objected to on the second reading in the Lords, and the bill was in consequence withdrawn. This agreement was then secretly made, by which a sum of money was to be secured and ultimately made payable to the proprietors of the Battersea Bridge, in lieu of the indemnity intended to have been given by the clauses in the bill; these were then expunged, and the bill presented and passed without them. It is unnecessary to notice some difference of fact which exists between the two cases because it does not affect the ground of the Vice-Chancellor's (Sir *T. Plumer's*) decision, which directly applies to the present question. He says, p. 367:—"The legislature and the public must have supposed the claim of compensation was given up, and that the money to arise from the tolls was to be applied as the act directs, and not in discharge of the money secured by this secret agree-

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(a) 1 Keen, 583.

(b) 3 Mylne &amp; Cr. 97.

(c) 2 Madd. 356.

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ment. If the compensation had been publicly insisted upon, the legislature might have passed the bill without regarding the claim; or, if they thought it a proper claim, might have refused to pass the bill, on the ground that the satisfaction of the claim would be too great a burden upon the undertaking. The object of the agreement was to prevent an opposition to the bill in parliament, and it was to be concealed from the legislature. Such an underhand agreement was a fraud upon the legislature, and contrary to principles of public policy; the contract was invalid." The decree, however, which his Honour pronounced after this strong expression of opinion did not *decide* on the invalidity of the bonds given in pursuance of the agreement, but left that to be tried at law. There was an appeal, and Lord *Eldon* (*Jac.* 64,) affirmed the decree. In the course of his judgment, however, he is reported to have made some remarks, from which it appears that in *the view which he took of the facts* he doubted of the soundness of Sir *T. Plumer's* reasoning. But it is remarkable that, as he stated them, he seems not to have adverted to that circumstance of purposed concealment from the legislature, on which Sir *T. Plumer* had laid so great stress; and that he certainly supposes a state of things before the Lords, on the second reading, very different from that alleged in the plaintiff's bill and admitted by the demurrer. By the bill it appeared that several Lords entertained objections especially to the clauses in question, on the ground that such a contract was illegal, and contrary to public policy, being founded on an improper "principle, and was likely to operate as a bar to the general improvement of the country." This Lord *Eldon* is made to treat as "something falling from some member of the committee," as "an imagination that scruples would be entertained," and an objection "made by one member of the committee not sanctioned or known by the House at large." With all the respect which we unfeignedly feel for the decisions of that most able and cautious judge, we are compelled to say that the reasoning which

he is stated to have used, even on his own view of the facts, appears to us to be wholly inconclusive. "It is argued," he says, "that this was a fraud upon the legislature, but I think it would be going a great way to say so, for, non constat, if it had been pushed to the extent of taking the opinion of the House, that it might not have passed the bill in its former shape." But, if the House might have *refused* to pass it in that shape, which is à priori equally supposable, and which the particular circumstances alleged make more probable; and, if they were the constituted judges to determine whether they would or no, and, still further, if the parties applying for their decision knowingly withheld from them material facts, we are at a loss to understand how the possibility of a decision the same way, even with those facts apparent, remove the imputation of fraud, or the objection on the score of public policy.

One case remains to be noticed, that of *Edwards v. The Grand Junction Railway Company* (a). The facts of that case, so far as they bear on the present point, were these:—the line of an intended railway was to cross a turnpike-road, the trustees opposed the bill, and prepared a petition to the Lords against it; subsequently a meeting took place and clauses were agreed on to be introduced into the bill, which were satisfactory to the trustees, and on the faith of which they agreed to withdraw their petition. It was then suggested on the part of the Railway that, as the introduction of the clauses into the bill would occasion delay and expense, the trustees should accept an agreement embodying their substance in lieu of them. This was yielded to, and the bill passed without them. The question was whether this agreement was binding, and both the present Vice Chancellor and Lord Chancellor held that it was. That case, however, is obviously distinguishable from the present: in the first place the bill, as it passed, contained nothing inconsistent with the stipulations in the agreement, a circum-

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(a) 1 Mylne &amp; Cr. 650.

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stance relied on by the Lord Chancellor in his judgment ; secondly, if the clauses had been inserted, the opposition of the trustees, who were alone interested in them, would, ex concessis, have been equally withdrawn ; and then, the only parties interested assenting, the bill would have passed according to the usual course of the legislature with such bills under the same circumstances ; but, as the agreement was to effect the very thing which the clauses would have provided for, it is impossible to say the legislature were imposed upon by it. This case, therefore, is not in point to one where the agreement between the parties and the enactments of the bill are opposed to each other. It in fact decided no more than this, so far as it bears on our present inquiry, that an agreement to make a particular bridge or viaduct of not less than fifty feet in width, in consideration of withdrawing opposition to a bill, one clause of which restricted the company from making any bridge or viaduct less than fifteen feet wide, might be binding.

It appears, then, that the conclusion to which we have come is sanctioned by the judicial opinions of Sir *T. Plumer* and Lord *Langdale*, and that there is no decision nor any clear expression of an opinion the other way.

We think there is great weight in the objection which arises to the validity of this contract from its being kept secret from the parties interested, who had given their assent to the bill, which enacted a different line, and might have either withheld their assent at first, or withdrawn it and opposed the bill afterwards, if they had known of the intended deviation. But the view we have already explained renders any remarks on that or the remaining point in the case unnecessary.

We are, upon the whole, of opinion that the second plea is good, and the judgment must be for the defendants.

Judgment for the defendants on second plea.

Judgment for the plaintiff on the first plea.

IN THE EXCHEQUER CHAMBER<sup>(a)</sup>.

Lord HOWDEN v. SIMPSON and others.

**ERROR** was brought on the above case in the Exchequer Chamber.

The case was argued (June 18) before *Tindal C. J.*, *Vaughan J.*, *Parke B.*, *Bosanquet J.*, *Gurney B.*, *Erskine J.* and *Maule J.*

*Cresswell*, for the plaintiff in error. The second plea cannot be sustained on the ground that the plaintiff had no right to make a contract respecting his own property with the Railway Company, because he might thereby be unduly influenced as a peer in voting upon the bill then before Parliament. The plaintiff entered into the contract as an individual; as such he withdrew his opposition to the bill; he entered into no contract to support it by his vote. If it were illegal for him to have an interest in a matter upon which he might be called upon to assist in legislating, no member of Parliament could hold Bank or East India stock, or even land itself, for the ownership of land might influence his vote upon the corn laws. The plaintiff might, consistently with his contract, have voted either for or against the railway, or have not voted at all upon it. He had an equal right with any other owner of property; which would be injured by the bill, to express his dissent; and he had the same right, after arranging with the Company for compensation, to withdraw that dissent and to express his assent.

Another question is, whether this agreement was a fraud upon the other landowners, because it was not communicated to them. Is a person selling his land to a railway

(a) See the preceding case. Error on this case has been brought in the House of Lords.

ground that it enabled the plaintiff to make a better bargain than other landowners.

*Quare*, whether such intention to conceal it from the landowners would have vitiated the agreement on any other ground.

3. That it was competent to the plaintiff, though a peer of Parliament, to make the agreement.

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Held, 1, (reversing the judgment of the Court below,) that the agreement (in the preceding case) was not illegal on the ground that it had been concealed from Parliament, it not appearing on the face of the agreement itself, or from the averments in the second plea, that it was the *intention* of the parties, at the time of making it, to conceal the agreement.

*Quare*, whether such an intention would have vitiated the agreement.

Held, 2. That, for the same absence of intention, the concealment from the other landowners did not vitiate the agreement; and *semble*, that even if such intention had existed, it would not have vitiated the agreement, at least on the

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company bound to give notice to all the world of the terms of his bargain? It is not the duty of the Company to contract on uniform terms with all the landowners. The loss and inconvenience suffered by different individuals from the passing of the railway must vary indefinitely: one has to relinquish a piece of land, not within miles of his residence, another to relinquish a park or garden, close under the windows of his mansion. Are these two individuals to assent to the railway bill on the same terms? If not, why should they each be informed of the terms agreed to by the other? They have no common interest, and can insist on no common measure of compensation. Again, was it the duty of the plaintiff or of the defendants to communicate the terms of this agreement? The plaintiff has no privity with the other landowners, the Company may have some privity with them. It was, therefore, the duty of the defendants, if of any person, to communicate this agreement to them. [*Parke B.* Did the plaintiff *bargain* that this agreement should be concealed from them?] No, it is no part of the agreement that it should be concealed, and the averment in the plea is merely that it was made “privately and secretly between the parties, and without the consent or knowledge” of the other landowners. The plaintiff does not contract for secrecy, but merely to dispose of his property on certain terms.

The next objection is, that this agreement was “not disclosed or known to” the Parliament by which the railway bill was passed. Why should it be so disclosed? The plaintiff contracted with the defendants, and not with Parliament; he had nothing to do with their proceedings before Parliament, and he was not bound to send to Parliament to communicate his proceedings in dealing with the defendants. It continually happens that an individual petitions Parliament against a railway bill, and afterwards an entry appears upon the Journals that he has entered into an amicable arrangement with the intended company. This objection to the plaintiff’s claim was adopted by the

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Master of the Rolls, discountenanced by the Lord Chancellor, and resumed in the judgment of the Court below. It is said that the Company pledged themselves before Parliament to a particular line as the most beneficial to the public, whereas they intended from the first to abandon that line and to ask for another, and that this is a fraud upon Parliament. The Company pledged themselves to no such thing; it is notorious that railway companies frequently propose a worse line to Parliament in the first instance, to obviate the objections of landowners, with the intention to get a better line, if they can, at some future session. But it can, at all events, be no answer to this action to say that this agreement was concealed from Parliament. Is the agreement itself legal? If it be so, the *subsequent* concealment of it, a thing not provided for by the agreement, cannot make the agreement bad. The original line was intended to be adopted by the Company, if a better could not be obtained; and, when the new line should be proposed, every landowner would have an opportunity of opposing it, and the plaintiff takes the chance of their opposition to the deviated line being successful. (He then commented, as in the Court below, upon the cases there cited.) It is a most essential part of public policy that every man shall be at liberty to sell that, which is his own, for anything he can get, without reference to the bargains of others, and that he shall not be bound to communicate to all the world in what manner he has dealt with his own property.

Another ground on which the plaintiff's claim is to be supported is, that the consideration moving from the plaintiff to the defendants, viz. his assent to the railway passing through his land, and the stipulation for paying him 5000*l.* on account of that consideration, are both perfectly legal, whatever may be the character of any of the other stipulations entered into by the defendants. Where a person, for a lawful consideration, agrees to do several things, some of which are lawful and some unlawful, he is

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bound, at least at common law, to do the lawful things. *Pigot's case* (a), *Norton v. Simmes* (b), *Mosdel v. Middleton* (c), *Featherston v. Hutchinson* (d), *Newman v. Newman* (e), may be referred to on this point. If the plaintiff had agreed not only to withdraw his opposition, but to sell his land to the Company for 100*l.* an acre, the Company would have a right to take his land at that price, even though the agreement to withdraw his opposition were unlawful. [*Parke B.* Suppose I sell a person a horse, and he agrees to pay 50*l.*, and to steal another horse for me, could I recover from him the price of my horse?] Yes, and without enforcing any illegal contract. Suppose an indenture to contain a covenant to pay rent clear of the property tax: to an action for breach of covenant to pay rent, the illegality of the stipulation that it should be paid clear of property tax, would have been no answer, but it would have been an answer to an action of covenant for not paying the property tax (f). So in this case, the payment of the 5000*l.*, which it is sought to enforce, is not illegal. Whether an agreement to conceal the intention of procuring the deviated line be illegal or not, no such agreement has been made in this case. The parties to this agreement have not stipulated for its concealment; and, if the agreement was lawful when made, it could not be vitiated by any thing that might occur subsequently. On this point *Catlin v. Bell* (g) is a clear authority. It was an action of assumpsit for not accounting for goods delivered by plaintiff to defendant to be sold on the plaintiff's account. The defendant was master of a ship trading from this country to the West Indies, where he was to sell the goods. The defence was, that the goods had not paid exportation duty, and it was shewn that the defendant's ship, in which they were carried, had cleared

(a) 11 Rep. 26 b.

(b) Hob. (25), p. 12, 5th ed.

(c) Ventr. 237.

(d) Cro. Eliz. 199.

(e) 4 Mau. & S. 66.

(f) See *Gaskell v. King*, 11 East, 165, and *Fuller v. Abbott*, 4 Taunt. 105.

(g) 4 Campb. 183.

out in ballast; that the adventure was therefore illegal, and so no action maintainable. But Lord *Ellenborough* C. J. said, "You do nothing unless you shew that it formed *part of the agreement* between the parties to defraud government of the duties. This would contaminate the contract; but it cannot be affected by the simple circumstance of the ship clearing out in ballast."

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Addison contrà. As to the case put in argument, the whole contract would be altogether illegal; for the stealing another horse and the payment of the 50*l.* would form one entire consideration. It is clear that, by the agreement now under discussion, the 5000*l.* is to be paid for damage to accrue to the plaintiff from the deviated line; and, if the contract for the deviated line was illegal, the compensation to be paid the plaintiff in respect of it cannot be recovered. The 5000*l.* was to be paid for the deviated line only, for it is to be paid "without prejudice to the further compensation to be made to him in the event of the said deviated line not being ultimately adopted, and without prejudice to such further compensation, &c. for any such damage and injury as hereinafter expressed." It appears, therefore, from this and other parts of the agreement that, if the deviated line were not carried, the plaintiff is to have the full compensation for damage done by the original line; 100*l.* an acre, as the price of his land; and a further compensation for injury done in the progress of the works; so that it is clear that the 5000*l.* is to be paid for the deviated line, and for nothing else.

The plaintiff, being a member of the House of Lords, was incompetent to enter into this agreement. It would be illegal for him to sell his vote as a peer, and, if so, it must be equally illegal, on principle, for him to make any contract which would influence his vote. It would have been a breach of his agreement if he had voted against the bill.

The bill was a contract between the Company and the

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several landowners that they would permit their lands to be taken on certain terms; and it was illegal for one landowner to make a secret agreement that he should have more from the Company than the other landowners. Had they known the terms made by the plaintiff with the Company, and that it was intended to get a deviated line, it is probable that they would not have assented to the bill. They assented upon the assumption that the line of railway would correspond with the plans deposited with Parliament. It turns out that another line is to be substituted. In the meantime they are prevented from dealing as they please with their land; and the landowners on the deviated line are deprived of all opportunity of opposing the original bill. It is said that the last mentioned landowners may appear afterwards, and oppose the deviated line; but they would oppose with much less effect, for the Company, when once established, would find it easy to get an amended line.

This agreement was also a fraud upon the other members of the Company, for it stipulates for a misapplication of their common funds. This act contains the usual provision that the money raised is to be laid out in discharging the expenses in obtaining the act, in purchasing the necessary lands, in making and maintaining the railway, or in otherwise carrying the act into execution: it is no part of the provisions of this act to satisfy the damages that may accrue to any one from the *deviated* line. This act only justifies the payment of compensation to the plaintiff for the original line. [*Cresswell*. The 5000*l.* to be paid to the plaintiff is towards the compensation to be paid him in the event of the railway passing otherwise than according to the deviated line, and is to form part of it.]

Lastly, it was a fraud upon Parliament to conceal the intention to abandon the line proposed, and to apply subsequently for a deviated line. The legislature, in passing railway bills, are trustees for all parties interested, for the Company, for the landowners and for the public. It can-

not then be legal that parties should secretly contract for the purpose of procuring another act essentially different from that which the legislature has to pronounce upon. [*Parke* B. The keeping it secret cannot affect the validity of the agreement, unless the parties bargained that it should be kept secret.] He then commented on the cases cited in the Court below.

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Cresswell, in reply. It is a mistake to suppose that the plaintiff is to receive 5000*l.* for the damage he may suffer from the deviated line. He agrees on his part to withdraw his dissent and to give his assent, and for *this* he is to receive certain equivalents, one of which is the payment of the 5000*l.* The plaintiff does not contract to get the deviated line: he simply withdraws his dissent, and says, "If you get the deviated line, I will consent to receive 5000*l.* for my assent; if you do not, I must have more."

Cur. adv. vult.

TINDAL C. J.—now delivered the judgment of the Court. In this case a writ of error has been brought on a judgment of the Court of Queen's Bench on a demurrer to a plea. Lord *Howden*, the plaintiff below, brought an action against the defendants upon a covenant contained in a deed, by which, after reciting that a bill had been introduced into Parliament for making a railway intended to pass through the estates and near the mansion of the plaintiff, and which the plaintiff thought likely to be injurious thereto, and therefore he was a dissentient from the undertaking, and was about to oppose the passing of the said bill, the plaintiff agreed, on condition of the stipulations, in the agreement contained, being performed, to withdraw his opposition to the bill and assent to the railway, and the defendants, four of the proprietors of the intended railway, agreed, in case the said bill should be passed into a law within the then session of Parliament, to give 5000*l.* to

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the plaintiff, towards compensation for the damage he would sustain, within six months after the passing of the act; and also agreed that they would in the next session of parliament apply and use their best endeavours to obtain an amended act, for making a deviation from the line of the railway in a particular direction. The deed contains many other stipulations not material to be adverted to, but it is to be observed that there is no one which expressly states, or from which it can be implied, that the agreement, or any part of it, was to be kept secret. The declaration on this deed alleges that the act passed, and that six months had since elapsed, and that the money was not paid.

The first plea states that the Company of proprietors had abandoned the proposed line, and in lieu thereof resolved to adopt another, which entirely avoided the lands of the plaintiff, and had presented a petition to Parliament for, and were using every effort to obtain, an act of parliament for carrying it into effect. To this plea there was a demurrer, and the Court of Queen's Bench held the plea to be bad, and on the argument before us it was not insisted that it was a good plea. It is indeed beyond all question, that this plea affords no answer to a covenant to pay the 5000*l.* absolutely at the end of six months after the passing of the act.

Upon the second plea, to which there was also a demurrer, the Court of Queen's Bench gave judgment for the defendants. [His lordship here stated the plea.]

The objections founded on this plea were threefold. First, that the deed was a fraud on the legislature; secondly, that it was a fraud on the proprietors of lands on the line of the railway; and thirdly, that it was void because it was against law, that the plaintiff, a peer of parliament, should make a bargain, which placed his private interest in conflict with his public duty.

The Court of Queen's Bench decided that the deed was invalid on the first ground, and gave no opinion upon the other two; and indeed little reliance was placed on them

in the course of the argument in this Court, and we are of opinion that no one of those objections ought to prevail, and that the judgment must be reversed.

The ground upon which the deed in question was contended to be a fraud on the legislature is this, that the plaintiff and the defendants were to be considered as having agreed together to represent to the legislature the line of road, described in the then pending bill, as the line which was to be adopted and acted upon, whilst in truth they intended at the time to apply for and adopt and act on another, if obtained. This is the view which Lord *Langdale* inclined to think might ultimately be taken of this transaction (a). It was also argued, that Lord *Howden* and the proprietors must be considered as having agreed to represent the proposed line of the road as the best for the public interests, though in reality they never meant to carry it into effect, and had a better in prospect. In either view of the case, the supposed fraud consists in an intention to make a *false* representation to the legislature, by stating the object of the adventurers to be to carry one line into effect, and concealing the design of applying for another. In both it is essential, in order to make the deed a fraud on the legislature, that the contract to apply for a new act should be intended by both parties to be kept secret from it. For, if it was to be disclosed, the idea of an intended fraud upon Parliament is obviously out of the question. It is not enough that the existence of such an agreement was, at the time of entering into it, and afterwards, in fact kept secret from the legislature and all the world besides by both parties; the quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it; and if there did not *then* exist the intention of deceiving the legislature by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever im-

(a) 1 Keen, 599.

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putation might rest on the conduct of the parties in making the subsequent concealment. This point appears to us to be clear ; and, on looking carefully at the plea, we find that there is no averment of any such intention on the part of the plaintiff or of the defendants at the time of the making of the agreement, or of any intention to make any untrue statement to the legislature. It is indeed alleged in the plea that the agreement was secret, and was kept secret; but it is quite consistent with every averment in the plea that both parties may have been innocent of any original fraudulent understanding, that the transaction should be kept secret, at the time the deed was executed. As the instrument is not upon the face of it fraudulent, as no intention of making any false representation or of concealing any thing can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged in the plea, and no such facts are alleged. The subsequent concealment from the legislature might, indeed, have been used as evidence to the jury, of the prior intent to conceal, if that intent had been averred, but such subsequent concealment would be evidence only, and would by no means be conclusive evidence; it cannot be used to supply the want of such a distinct averment. It is not necessary therefore to decide whether such an intention, if it existed, would have avoided the deed, and, if averred in the plea, would have made it a sufficient answer to the declaration. Now this defect in the plea does not appear, so far as we know, to have been distinctly brought to the attention of the Court of Queen's Bench, and the judgment pronounced by that Court seems to have proceeded upon an assumption of the intention of both parties to keep the whole transaction secret.

The same observation disposes altogether of the objection to the deed, on the ground that it was a fraud on the land owners. It is suggested to be a fraud, either on the ground that, if the fact of Lord *Howden* having obtained apparently so large a compensation had been disclosed to the land-

owners, it would have induced them to insist on better terms for themselves; or on the ground that, if the intention not to act upon the powers given by the statute had been known to them, they might have made a different disposition of their lands. But on either view the intention to keep either one branch of the agreement or the other a secret from the landowners is essential to make the deed fraudulent, and no such intention is averred. If such intention had even existed, there would still be a difficulty in holding that the deed would be fraudulent on the ground that the supposed goodness of the bargain was intended to be concealed; for it would seem that each landowner might lawfully make the best agreement he could for himself with any company of proprietors, just in the same manner as if a private individual, for any purpose of his own, were negotiating to purchase the land of the same persons. There is no common obligation on all the different proprietors to place themselves on the same footing, as there is in the case of a general composition with creditors, in which case there is sometimes an express and generally an implied agreement, that all, or all who are not expressly excepted, shall share equally, and derive an equal benefit from the estate of the insolvent. It is that agreement or understanding alone which imposes an obligation on each creditor to be in the same situation as another, and there seems no analogy between their situation and that of unconnected landowners.

The last objection is, that the deed was illegal, as it places the private interests and the public duty of the plaintiff, as a peer of Parliament, in opposition to each other. We can have no hesitation in saying that, if it were averred in the plea, and proved, that the sum of 5000*l.*, or any part of it, was really paid as a consideration for Lord *Howden's* giving his vote for or withholding his vote against the bill, and that the statement in the deed was in this respect a mere colour to conceal the real nature of the transaction, the deed would have been thereby rendered corrupt and

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illegal, and consequently void, and that no action would lie for any part of the money. But illegality is not to be presumed; it is to be alleged and proved, when it does not appear on the face of the instrument itself. Though Lord *Howden* was a peer, that would not affect his right to make any bargain for the sale of his land, or for a compensation for any injury to it; if it did, a peer or member of Parliament would be placed in a worse condition than any private individual. We must presume, as there is no averment to the contrary, that his quality of peer in no way affected the bargain in question, and that he was left, notwithstanding that agreement, to exercise his free judgment, and give or withhold his vote according to his conscience, upon the measure, when it came before him in his legislative capacity. In the absence of any agreement or understanding that the vote should be given in a particular way, the mere tendency or possible effect of such a contract on the vote of a member of either House cannot be taken into consideration.

We are therefore of opinion that no one of the objections urged by the defendants in error can prevail, that the pleas of the defendants cannot be supported in law, and that the judgment of the Court below must be reversed.

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certain grates, &c. were part of the demised premises, and further to order what should be done to make a final determination of such matters in difference. He awarded certain damages to the plaintiff on the issues in the declaration, and found that the grates, &c. were part of the demise of the defendant to the plaintiff, and that they were removed and carried away by the defendant, and applied to his own use, and that they were of the value of 11*l.* 5*s.*, and he ordered the plaintiff to fix and set up other grates, locks, &c. in the place and stead of such as were removed as aforesaid, and to leave the same to and for the use of the defendant at the end of the term, and that the defendant should pay to the plaintiff the sum of 11*l.* 5*s.*

The affidavit of the defendant having denied that power was given to the arbitrator to order what should be done by the parties as to the grates, Held, that the award was bad, as the arbitrator had exceeded his power, and the award itself was uncertain in not specifying the quality and price of the grates to be set up. Held also, that, as the matter in difference as to the grates was one of the matters submitted to the arbitrator, the finding on that part being bad, the whole award must be set aside.

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2. It is no answer to an action on a promissory note, not made payable to bearer or order, that when the note became due the defendant was ready to pay on the note being produced and delivered up to him, and always had been and still was ready to pay on the production of the note. *Wain v. Bailey.* 507

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end to the tenancy, had made improvements on his land, received, in January, notice to quit in six months, and at the Michaelmas following possession was demanded by the Company. The Company then finding that it was not a Michaelmas holding, told the tenant he might retain possession till Christmas. The tenant remained in possession until after that period:—Held, that as he held over after notice, his situation was the same as if a regular landlord's notice had been given, and that he was not entitled to compensation. *Reg. v. London and Southampton Railway Company.* 243

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2. Before the passing of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), the common clerk of a borough, under the terms of the governing charter, discharged the duties of town clerk, clerk of the peace and clerk to the justices, and possessed the power of appointing a deputy. On the passing of that act the town council appointed him to the office of town clerk, but he refused the appointment. On appeal to the Lords of the Treasury for compensation, their lordships awarded him compensation for the offices of clerk of the peace and clerk to the justices, but refused to award any for the office of town clerk, to which he had been re-elected, and this Court refused to issue a mandamus to the Lords of the Treasury, to determine his claim to compensation for the loss of that office. *Reg. v. Lords of the Treasury.* 369

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3. The town clerk of a borough, who had been re-appointed under the provisions of the 5 & 6 Will. 4, c. 76, and was afterwards removed

from his office for alleged misconduct, on refusal by the town council to grant him compensation, appealed to the Lords of the Treasury: their lordships decided that, as the re-appointment of the town clerk had been made *bond fide*, and not with the intention of removing him on the first opportunity, and as the cause for dismissal appeared to them justifiable, the town clerk was not entitled to compensation. A mandamus to the Lords of the Treasury, to hear and determine the merits of the appeal, was refused on the ground that, if their lordships had jurisdiction in the matter, they had already exercised it, and, if they had not jurisdiction, a mandamus would not lie.

Semble, the Lords of the Treasury have not jurisdiction to decide whether a town clerk has or has not been properly removed from his office.

4. A refusal by the town clerk to deliver up to the town council certain corporation documents and the corporation seal, and an opposition by him to a petition by the council to obtain the appointment of charity trustees, do not constitute sufficient cause to warrant his removal from an office held during good behaviour. Nor is such cause furnished by his acting in concert with another person, who addressed abusive language to an alderman and magistrate of the borough, in a public part of the borough. *Reg. v. Lords of the Treasury.* 498

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In the Exchequer Chamber the judgment of the Court of Queen's Bench on the latter point was reversed, on the ground that it did not appear that at the time of entering into the agreement there was any intention to conceal it.

Quære, whether such intention would have vitiated the agreement.

Held also, that the agreement was not void because it had been concealed from other owners of land over which the railroad was to pass, or because the plaintiff was a peer of parliament. *Lord Howden v. Simpson.* 714

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note, or that he knew it to be worthless, there was no sufficient false pretence in that respect, and, as the two pretences were to be taken together, that the indictment was bad, and judgment given upon it was reversed in error. *Wickham v. Reginam.* 333

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II. Liability of Custom-house Officers to Action for taking Goods from person without demand.

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by force, from under the arm of a passenger landing from a vessel, a portfolio containing school-drawings, without making any previous demand:—Held, that, as drawings which had not paid duty were liable to forfeiture, under 3 & 4 Will. 4, c. 56, the officer was not liable in trespass de bonis asportatis, but, per Lord Denman C. J., he would be liable in an action of trespass to the person, unless some attempt were made to conceal the goods. *De Gondouin v. Lewis.* 283

III. Who are Custom-house Officers.

By 3 & 4 Will. 4, c. 51, s. 2, her majesty may appoint commissioners for managing and collecting the customs: by sect. 6 these commissioners may appoint persons to execute the duties of the several offices necessary to such management and collection, under the controul of the commissioners; and by sect. 7 every person so employed on any duty or service is to be deemed the officer of the customs for that duty or service. The defendant was employed under the above act and 3 & 4 Will. 4, c. 52, s. 18, his duty being to collect the duty on any goods for which any entry should be tendered, and upon payment of the duty to sign a bill of entry as a receipt, the same being a warrant for delivery of the goods from the proper officer:—Held, 1, That defendant, as such collector, filled a ministerial office; that he was a substantive officer of the crown, and not merely the servant of the commissioners: 2, That he was liable in Case for refusing to sign such bill of entry for a person who had tendered the duty payable on his goods. *Barry v. Arnaud.* 633

DEMISE.

In ejectment. See EJECTMENT, 1.

DEMURRER.

Judgment by default for not joining in, not final. See **WRIT OF RIGHT**.

DEPOSITIONS.

In bankruptcy, admissibility of. See **EVIDENCE, VI.**

DEPUTY CLERK OF PEACE.

Liability for practising at sessions. See **CLERK OF THE PEACE**.

DETAINDER.

See **ARREST, 4.**

DEVISE.

Devise on erroneous Assumption of Facts.

Where a testatrix by her will devised all her estate to *L. E.* for life, and to his sons and daughters successively, in strict tail, and *L. E.* and his only son died in the lifetime of the testatrix, but he left a daughter, *E. E.*, of whose birth she knew nothing, and she thereupon made a codicil, in which she recited her former will, and that *L. E.* had died without leaving any issue, and then devised over:—Held, that as this codicil was made in ignorance of the existence of *E. E.*, it was only a conditional revocation. Some time after making the codicil, the testatrix was made acquainted with the existence of *E. E.*, but made no further testamentary disposition:—Held, that this did not set up the codicil, as the testatrix, after knowledge of the facts, had not republished it according to the Statute of Frauds. *Doe v. Evans.* 378

DIRECTORS.

See **JOINT STOCK COMPANY.**

DISTRESS.

Ratification of Distress by Executor.
Where a distress was made by com-

mand and in the name of a landlord, but he died before the distress was actually made:—Held, that the bailiff might make cognizance as the bailiff of his executrix, under 32 *Hen. 8, c. 37*, who ratified the distress, although before probate. *Whitehead v. Taylor.* 367

DUPLICITY.

In a conviction. See **CONVICTION.**

DUTIES.

On wreck. See **CUSTOMS, I.**

EASEMENT.

Twenty years' enjoyment of. See **LIMITATIONS.**

ECCLESIASTICAL COURT.

See **PROHIBITION.**

EJECTMENT.

Judgment recovered in, an estoppel to plea of *lib. ten.* in action for mesne profits. See **ESTOPPEL, I. 1.**

Day of Demise.

1. A demise in ejectment, laid on a day on which the forfeiture of a lease was incurred, to commence from two days previous, is good. *Doe v. Wells.* 396

Stay of Proceedings.

2. Courts of common law have no jurisdiction to stay proceedings in ejectment brought on a clause of re-entry for breach of covenant to repair. *Doe d. Mayhew v. Asby.* 302

ELECTION.

Of municipal officers. See **MUNICIPAL CORPORATION, I. III.**
Of high constable. See **CONSTABLE.**

ERROR.

From the Court of Common Pleas at Lancaster to the Queen's Bench,

and afterwards to the Exchequer Chamber. *Nesbit v. Rishton*. 706

ESCAPE.

See LIBERTY.

ESTATE.

On lives. See FINE.

ESTOPPEL.

I. Of Record.

Judgment in Ejectment for Proof of Title.

1. In trespass for mesne profits by *John Doe*, the declaration (of 1837) laid an expulsion the 10th July, 1826, continued to the commencement of the suit. Pleas: 1. denial of plaintiff's possession; 2. liberum tenementum. Replication, by way of estoppel, that ejectment had been brought for the same premises on two demises to the plaintiff, one of the 10th July, 1826, for fourteen years, the other of the 26th December, 1831, for seven years, with a single ouster on the 27th December, 1831, and that after plea of not guilty the terms were recovered by judgment. Rejoinder, that a writ of error on the judgment was pending in the House of Lords:—Held, that the replication was good by way of estoppel, and that its effect was not avoided by the rejoinder. *Doe v. Wright*. 672

Of Sheriff's Return, in Action against Bailiff of Liberty.

2. To a declaration against the bailiff of a liberty, alleging an arrest under a mandate and an escape, a plea against the further maintenance of the action that after the commencement of the suit the sheriff had returned cepi corpus, pleaded by way of estoppel, was held ill. *Jackson v. Hill*. 455

II. In Pais.

Of tenant to dispute landlord's title. See LANDLORD AND TENANT, II. 2.

By Conduct of Party.

3. Where the plaintiff, who was owner of the goodwill and fixtures of a public-house, allowed *A. B.* to represent himself as such to the landlords, and the latter thereupon let the public-house to *A. B.*, and *A. B.* sold the lease and fixtures to the defendant, who was informed by the landlords that *A. B.* was their tenant:—Held, that the plaintiff had estopped himself from recovering the fixtures from the defendant, who had purchased bona fide. *Gregg v. Wells*. 296
4. The defendant had brought two separate actions of trover for a dog at the same assizes against *A.* and *B.*; in the action against *A.* he recovered a verdict for 50*l.*, to be reduced to 1*s.* by consent, on *A.* giving up the dog; in the action against *B.*, *B.* obtained a verdict. At the trial of these actions the dog was in the possession of *B.* A few days after the trials, *B.* gave the dog in question to *A.* for the purpose of delivering it up to the defendant, with 1*s.* damages. *A.* accordingly gave up the dog, and at the same time *B.*'s attorney gave the defendant notice that the dog belonged to *B.* and demanded possession; the defendant refused:—Held, on trover afterwards brought by *B.* for the dog, that *B.* had not estopped himself from recovering by enabling *A.* to give possession of the dog to the defendant. *Sandys v. Hodgson*. 435

By Principal ratifying Acts of Agent.

5. Case against the Bank of England for not transferring, according to 18 Geo. 2, c. 9, s. 31, a share of consolidated annuities, the property of the plaintiff's testatrix. Pleas: 1. not guilty; and 2. that testatrix was not possessed. At the trial it appeared that the testatrix for many years before her death was very old and infirm, and when she

received her dividends was accompanied by her nephew, who was a clerk in the bank. He asked for the amount, she signed receipts both in the dividend warrants and in the bank books. It appeared probable that he had paid her from time to time the dividends on her whole stock; but he had at intervals taken another woman to the bank, who personated testatrix, and forged her signature to several transfers.

At the trial the jury found that the testatrix was not proved to have had knowledge of the transfers, but that she had the means of knowledge; that she was guilty of gross negligence in leading the bank to believe that she sanctioned the transfers: and that the bank was not guilty of negligence in transferring without ascertaining her identity more fully:—Held, that the facts found constituted an answer to the action, and were available under the pleadings. *Coles v. Bank of England.* 521

EVIDENCE.

I. Admissions.

Admissions of prior indorser, when evidence against indorsee. See **BILLS OF EXCHANGE**, 3.

II. Account stated.

Of an account stated. See **ACCOUNT STATED**.

III. Award.

Inadmissibility of, to explain award. See **ARBITRATION**, 5.

Award not evidence of reputation. See **MANOR**.

IV. Boundary.

Of boundaries of manors. See **MANOR**.

V. Company.

Against directors of company. See **JOINT STOCK COMPANY**.

VI. Depositions in Bankruptcy.

Depositions made by a witness

sent by the petitioning creditor to prove an act of bankruptcy before the commissioners, are admissible in evidence against the petitioning creditor in any subsequent action against him, although the witness is still living. *Gardner v. Moul.*

403

VII. Merchants' Letter Books.

The plaintiff had given notice to the defendant to produce certain letters written by the defendant to the defendant's partner in New South Wales, and had called upon him to admit an extract from a letter book kept by the defendant, describing it. A judge made an order on the defendant to make the admissions contained in the notice, and the defendant consented to produce the letter book at the trial:—Held, that the letters contained in the letter book were secondary evidence of those described in the notice to produce, although no proof was given that the letters had been actually sent. Held also, that the defendant was not entitled to read other letters contained in the letter book.

The notice to produce was served three days before the trial:—Held, that as the letters must be presumed to have been sent back from New South Wales, it was sufficient to let in secondary evidence.

The fact of copies of letters being kept in a merchant's letter book, is evidence against the party of the letters having been sent. *Sturge v. Buchanan.* 573

VIII. Minutes of Court of Sewers.

To prove the liability of the defendant to repair a sea wall *ratione tenuræ*, minutes of the court of sewers, commencing seventy years back, containing orders on the then holders of the estate to repair the wall in question, were held admissible. *Reg. v. Leigh.* 357

IX. *Against Sheriffs.*See **SHERIFF.****X. *Competency of Witness, how restored.***

Although the objection to the competency of a witness (such as an accommodation drawer of a bill) appears on the record, his competency is restored by his statement that he has a release without producing it. *Lunniss v. Row.* 538

XI. *Onus of Proof.*See *Garcy v. Pike.* 427**EXAMINATION.**

On which order of removal made. See **POOR, II.**

EXCHEQUER CHAMBER.

Error from the Common Pleas, Lancaster. *Nesbit v. Rishton.* 706

EXECUTION.

Taking defendant in, a second time. See **ARREST, 3.**

EXECUTOR.

1. Power to ratify distress before probate. See **DISTRESS.**

Contract binding on Executor.

2. A contract to supply *A.* from 50 to 100 tons of blocks of slate, of certain dimensions, monthly, and also from 100 to 180 tons of blocks of other dimensions, monthly, and any further quantity that he might require, not exceeding 200 tons per month, the contract to be in force to a certain time, unless previously cancelled by mutual consent, is a contract binding on his administrator. *Wentworth v. Cock.* 251

EXPENSES.

Of witnesses. See **WITNESS, 2.**

FALSE PRETENCES.See **CRIMINAL LAW.****FEES.**

Of clerk to Petty Bag Office. See **WITNESS, 2.**

FINE.

An estate was granted by the lord of a manor to fourteen charity trustees, and by a decree in Chancery new trustees were directed to be successively appointed by the lord, subject to the approbation of a master in Chancery, and whenever nine lives should have dropped, nine new ones were to be in like manner nominated. The lord claimed double the admitted yearly value on the first life, half of that sum on the second life, half of the last amount on the third, and so on in a descending series:—Held, that a fine calculated on this principle, was a reasonable fine, and that it was not competent to the defendant to shew that it would be unreasonable, from the lord's privilege of naming the lives, and the probability for that reason, and on account of the necessity of charity trustees being persons of mature age, that the lives would fall more frequently than if they were nominated by the trustees.

Quære, however, whether the fine ought to be reduced on the ground that the renewal was to be not on the dropping of nine specified lives, but on the dropping of nine out of fourteen specified lives, and would therefore occur sooner. *Wilson v. Hoare.* 659

FORFEITURE.

Of lease. See **EJECTMENT, 1, 2.**
By denial of landlord's title. See **LANDLORD AND TENANT, II.**

FORGERY.

Transfer of stock by. See **ESTOPPEL, 5.**

FRAUD.

In indorsement of bill of exchange, how to be pleaded. See **PLEADING**, I. 3.

Principal bound by act of agent. See **ESTOPPEL**, 5.

FRAUDS (STATUTE OF).

Acceptance within statute of. See **CONTRACT**, 1.

Parol Waiver of Part of Contract.

1. In a written contract within section 17 of the Statute of Frauds, to deliver, on a certain day, goods of a fluctuating value, to be paid for by bill at three months from delivery, the time of delivery is of the essence of the contract, and any agreement to substitute another day must be in writing. *Stead v. Dawber.* 447

Promise to indemnify.

2. Where the defendant, an attorney, requested the plaintiff to execute a bail-bond to the sheriff for a client of the defendant, and promised to indemnify:—Held, that it was a promise to answer for the debt or default of another, within the 4th section of the Statute of Frauds. *Green v. Creswell.* 430

Growing Crops.

3. A contract, by which the defendant was to give 45*l.* for crops of growing corn and potatoes, and the stubble afterwards and whatever lay grass was in the fields, the defendant to harvest the corn and dig the potatoes, and the plaintiff to have the liberty of turning his own cattle on, and to pay the tithe, —is not a contract for the sale of an interest in land; for the growing crops are mere chattels, and with regard to the grass, as the plaintiff did not part with his possession of the soil, the contract was to be construed as an agistment of

the defendant's cattle by the plaintiff. *Jones v. Flint.* 594

GAOLS.

Liability of Borough to County Gaol.

Under 5 & 6 Will. 4, c. 76, s. 114, the treasurer of a county may make an order upon the council of a borough, having a separate Court of Quarter Sessions, for the costs arising out of the punishment and maintenance of offenders committed for trial to the county assizes from the borough:—Held, that this applied to prisoners committed to the borough gaol before trial, and, after trial at the assizes, committed to the county prison in execution of their sentences, and that the council was liable although there was no contract in force under 5 Geo. 4, c. 85, between the county and borough justices, for the maintenance of such prisoners.

Held also, that the council was liable not only for the expenses of the food, clothing and punishment of such prisoners, but for a proportionate share of the general expenses of the county gaol. *Reg. v. Johnson.* 610

GENERAL ISSUE.

By statute. See **PLEADING**, II.

GOODS, WARES, &c.

See **FRAUDS**, 3.

GROWING CROPS.

See **FRAUDS**, 3.

GUARANTEE.

See **FRAUDS**, 2.

Interest on. See **INTEREST**, 2.

Continuance of, when given to a Partnership.

1. Where the defendant gave the following guarantee: "Messrs. M.

& D., My son, G. D., is desirous of commencing business in your way, and wants the usual credit for four or six months. If you think well to supply him I will be answerable for the amount of 100*l.*:"—Held, that this was not a guarantee binding on the defendant after a change in the firm of *M. & D. Dry v. Davy.* 249

Valid Consideration for.

2. Assumpsit on a guarantee by defendant to see paid certain acceptances of Messrs L., in consideration of plaintiff's giving up, at defendant's request, a previous guarantee by him to pay plaintiff 10,000*l.* for Messrs. L. The guarantee given up was as follows:—"In consideration of your *being in advance* to Messrs. L. in the sum of 10,000*l.* for the purchase of cotton, I hereby give you my guarantee for that amount in their behalf:"—Held, that it was not clear that this guarantee was invalid, so as to be worthless as a pecuniary consideration, for it might be construed to relate to prospective advances, but that at all events, as the plaintiff had been induced at the defendant's request to part with it, the relinquishment of it was a good consideration for the subsequent guarantee. *Haigh v. Brooks.* 477

HEIR.

To copyholds substituted by Court of Chancery. See COPYHOLD, 2.

HIGH CONSTABLE.

Appointment of. See CONSTABLE.

HIGHWAY.

See RAILWAY COMPANY, 2.

HOUSE OF COMMONS.

See PARLIAMENT.

HUSBAND AND WIFE.

Liability of Husband, after Separation.

Where a husband, separated from his wife, by his violent conduct renders it necessary for her to exhibit articles of the peace against him, he is liable for the expenses thereby incurred, although he allows her a separate maintenance. *Turner v. Rooks.* 294

ILLEGALITY.

Of contract. See CONTRACT, 2.

IMPRISONMENT.

Render of Defendant who has given Bond to pay Debt.

A trader who has entered into a bond with sureties, under 1 & 2 Vict. c. 110, s. 8, to pay the amount of debt and costs which may be recovered against him, or to render himself, may be rendered by his sureties before judgment. *Owston v. Coates.* 485

INDEBITATUS ASSUMPSIT.

See *Garcy v. Pike.* 427

INDICTMENT.

See CRIMINAL LAW.

INSOLVENT.

Plea of insolvency of plaintiff. See PLEADING, VII.

INTEREST.

I. *On Bills of Exchange.*

1. The following promissory note, the consideration for which did not appear, was held to carry interest from its date:—

"July, 1808. I promise for myself and my executors to pay A. B. (or her executors), one year after my death, 300*l.* with legal interest. *Roffey v. Greenwell.* 365

II. *On Indemnity Bond.*

2. Where the defendant conveyed an estate to plaintiff with a covenant

for quiet enjoyment, and also gave an indemnity bond with sureties against "all costs, claims, demands, damages and expenses whatsoever," the plaintiff having been obliged to pay divers sums for arrears of an annuity charged on the estate, sued the defendant on the bond to recover them back with *interest*; the jury found that the plaintiff had been negligent in not suing the sureties on the bond at the time the payments were made:—Held, that this finding prevented the plaintiff from recovering the interest. *Anderton v. Arrowsmith*. 408

III. *Above Five per cent.*
See USURY.

INTERPLEADER RULE.

Costs under. See COSTS.

IRREGULARITY.

Effect of taking defendant in execution on an irregular *ca. sa.* See ARREST, 3.

JEOFAILS.

Bad plea of payment not cured by verdict. See PLEADING, IV. 2.

JOINDER OF PARTIES.

See JOINT STOCK COMPANY—SCIRE FACIAS, 2.

JOINT STOCK COMPANY.

A Bankrupt Director must be joined as Plaintiff.

In assumpsit by the directors of a joint stock company, constituted by deed, the deed must be produced, to shew who are directors; and it is not sufficient to shew that the plaintiffs are the persons acting as directors. A director who has become bankrupt must neverthe-

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less be joined as plaintiff, even although he has ceased to act, unless it be shewn that he has vacated his office. *Phelps v. Lyle*. 314

JUDGMENT.

Signing judgment for frivolous plea. See PLEADING, IX.
When not final. See WRIT OF RIGHT.

JUDGMENT RECOVERED.

Plea of, an estoppel, though writ of error pending. See ESTOPPEL, I. 1.

JURISDICTION.

I. *Of Common Law Courts.*

Over Actions of Ejectment. See EJECTMENT, 2.

Over questions of parliamentary privilege. See PARLIAMENT, 2.

Of Queen's Bench over judgment of Manor Court. See MANDAMUS, II. 2.

Of Queen's Bench in actions against marshal. See MARSHAL.

II. *Of County Justices.*

See PLEADING, I. 2.

As to appointment of high constable. See CONSTABLE.

III. *Of Court of Chancery over Copyholds.*

See COPYHOLD, 2.

IV. *Of Ecclesiastical Court over Matters triable at Law.*

See PROHIBITION.

V. *Of Lords of Treasury over Compensation to Municipal Officers.*

See COMPENSATION, 2, 3.

VI. *Of Poor Law Commissioners.*

See POOR LAW COMMISSIONERS, 2.

JUSTICES.

Decisions of, at Sessions. See SESSIONS, 2.

Jurisdiction of. See PLEADING, I. 2.

As to appointment of high constable. See CONSTABLE.

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JUSTIFICATION.

Of sheriff's officer on illegal arrest.
See ARREST, 4.

LANCASTER.

Error from the Court of Common
Pleas at Lancaster. *Nesbit v.*
Rishton. 706

LANDLORD AND TENANT.

I. *Notice to Quit, under Railway Act.*
See COMPENSATION, 1.

II. *Denial of Landlord's Title.*

Not a Forfeiture.

1. A denial by parol of a landlord's
title does not incur a forfeiture of
a lease for years. *Doe v. Wells.*
396

When Possession not given by.

2. *Replevin.* Avowry for rent. The
plaintiff had been let into posses-
sion of premises, as tenant for a
year, by *N.*, six months' notice to
be given on either side, and had
paid rent to him. Before the end
of the year the defendant went to
plaintiff and claimed title, and de-
sired that the rent in future should
be paid to himself. The plaintiff,
in order to be satisfied of the truth,
went with defendant to *N.*, who
admitted defendant's title, and that
plaintiff must consider him land-
lord:—Held, that the plaintiff,
who assented and subsequently
paid rent to the defendant, could
not contest his title. *Hall v. But-*
ler. 374

LETTERS.

Secondary evidence of. See Evi-
DENCE, VII.

LIBEL.

Privilege of House of Commons to
publish. See PARLIAMENT, 2.

LIBERTY.

When Bailiff of, not liable for Escape.

Where a ca. sa. was sued out against
T., and delivered to the sheriff of
Y., who thereupon sent his warrant
to the bailiff of a liberty within his
county, directed "to the gaoler of
the county gaol, the bailiff of the
liberty, his deputies, and *Job Doe,*
my bailiffs," and pursued the terms
of an ordinary warrant:—Held,
that this was a sheriff's warrant,
and not a mandate, although in-
formal in being directed to the bai-
liff's deputies. *Jackson v. Hill.*
455

LIMITATIONS.

Enjoyment of Easement.

To declaration in case for causing
offensive stench to come over the
plaintiff's land, the defendant
pleaded that for twenty years next
before, &c., he had enjoyed of
right, &c., the benefit of using a
mixture on his own premises, near
to premises of plaintiff, that there-
by stench necessarily arose, and
that, in using the mixture at the
times when, &c., stench neces-
sarily arose, which were the griev-
ances complained of:—Held, that
plaintiff was entitled to judgment
non obstante veredicto, as the plea
did not state that the *stenches* had
for twenty years passed over the
plaintiff's land. *Flight v. Thomas.*
531

LOCAL ACT.

Compensation under. See COMPEN-
SATION, 1.

LORDS OF TREASURY.

Jurisdiction of, over compensation
See COMPENSATION, 2, 3.

MALA FIDES.

How to be pleaded. See PLEADING,
I. 3.

MALICIOUS TRESPASS.

Defence under 9 *Geo.* 4, c. 31. See **PLEADING**, VI.

Notice of action under 7 & 8 *Geo.* 4, c. 30. See **NOTICE**, V. 2.

MAINTENANCE.

Separation. See **HUSBAND AND WIFE**.

MANDAMUS.**I. Where it lies.**

To railway company to complete their line. See **RAILWAY**, 2.

To admit burgesses. See **MUNICIPAL CORPORATION**, II.

II. Where not.

1. Where the case had been determined on by a Court of competent jurisdiction. See **COMPENSATION**, 2.

2. Mandamus to the lord and steward of a manor to hear a plaint. Return, that in 1835 the plaint was set aside and annulled for certain errors (stated in the return); that afterwards (in 1838), in obedience to the writ the defendants heard the plaint again, when, for the same errors and others (stated in the return) it was adjudged that the plaint had been rightly set aside in 1835, and that they could not take further cognizance of the plaint; that therefore they could not proceed in the plaint as by the writ they were commanded.

Held, 1st, that the return was not contradictory on the ground that it stated both that the plaint had been proceeded with in obedience to the writ, and that it could not be so proceeded with; 2d, that the return shewed that judgment had been given, and that this Court could not review it. *Reg. v. Lord of the Manor of Old Hall.* 515

III. Practice in.

1. A single rule for several writs of

mandamus is irregular. *The Queen v. Mayor of Bridgnorth.* 317

2. The Court will make absolute a rule for a mandamus to insert a name on the burgess roll, under 11 *Will.* 4 and 1 *Vict.* c. 78, s. 24, although the year for which such burgess roll was made out has expired since the granting of the rule nisi, and the mayor is dead to whom the rule was directed. Such a writ is not peremptory in the first instance. *Reg. v. Mayor of Eye.* 348

MANDATE.

Sheriff's warrant or mandate, construction of. See **LIBERTY**.

MANOR.*Boundary of.*

In an action which turned on a question as to the boundary of two manors, a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to determine for which party the verdict was to be finally entered, and to set out the boundaries. He directed the verdict to be entered for the plaintiff. In a subsequent action by the defendant against a third party, where the question was as to the boundary of the same manors, the verdict was received, but the award rejected, as evidence of reputation.

An ancient presentment by the homage of a manor, in the form of a book, set out the boundaries of a manor, and then gave, in alphabetical order, the names of the several parishes within it, and of the tenants resident in each parish, but this part of the presentment contained nothing as to boundaries. Two or three sheets of the concluding part of it, where the parish of Y. should have followed in order, had been cut off, but under what circumstances did not appear.

In an action involving a question as to the boundary of the manor, where it was admitted that the manor and Y. were conterminous in the direction of the locus in quo, the presentment was admitted as evidence of the reputed boundary, as the document, although mutilated, was perfect in that part of it which related to the subject of the boundary. *Evans v. Rees.* 626

MANOR COURT.

Judgment of. See MANDAMUS, II. 2.

MARSHAL.

Of Queen's Bench.

The statutes 2 Geo. 2, c. 22, and 32 Geo. 2, c. 28, which empower the Courts of Westminster Hall to hear and determine in a summary way, and to award reparation, upon the complaint of any prisoner of any abuse committed by the gaoler of the Court, &c., in his office, do not take away the right of action at common law from such prisoner, though *semble* both remedies are not open to the prisoner. *Yorke v. Chapman.* 493

MEMORANDUM.

Peregrine Dealtry, Esq. appointed coroner of Queen's Bench. 352

MEMORIAL.

Of annuity. See ANNUITY.

MERCHANT.

Letter-book, presumption from. See EVIDENCE, VII.

MESNE PROFITS.

Judgment recovered in ejectment estops defendant from pleading lib. ten., in action for, notwithstanding a writ of error pending. See ESTOPPEL, I. 1.

MISNOMER.

Effect of, on arrest. See SHERIFF, 3.

MONEY HAD AND RECEIVED.

See VOLUNTARY PAYMENT.

Where action on tort may be waived. See PLEADING, II. 2.

MUNICIPAL CORPORATION.

See GAOLS—MANDAMUS, III.—COMPENSATION, 3.

I. Admission to Corporate Office.

The declaration required by the 9 Geo. 4, c. 17, s. 2, "*upon admission*" to corporate offices, must be made *before* admission, and if the party elected refuse to make it, on tendering himself for admission, his election is void. *Humphery v. Reginam.* 691

II. Title to be a Burgess.

1. A person rated for the whole of a house, which he occupies, with the exception of one room, underlet by the week, has a sufficient occupation to entitle him to be on the burgess roll, under 5 & 6 Will. 4, c. 76, s. 9.
2. So also where one house adjoined another, both being under the same roof, and having a common entrance passage, into which the outer door of each opened, and a common staircase leading to the bed-rooms; each house is distinct, and may be the subject of a sufficient occupation under the last-mentioned statute.
3. But where a person let a cellar, under the house for which he was rated, to a person who occupied it as a warehouse, and was rated for it, there being an internal communication between the house and cellar, the occupier of the house is not qualified to be on the burgess roll.
4. The occupier of a house, who

had assigned all his stock in trade and book debts to a creditor, is, nevertheless, qualified to be on the burgess roll. *Reg. v. Mayor of Eye.* 348

5. The payment of rates under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 9, must be such as may be fairly considered as a payment by the burgess himself, and it is not enough that it has been made with his sanction at the expense of a third party. *Reg. v. Mayor of Bridgnorth.* 317

III. Aldermen, Election of.

An election of aldermen by lists under the 5 & 6 Will. 4, c. 76, where each elector has the opportunity of objecting to any of the lists proposed, or of proposing and voting for any other candidate, is good. *Reg. v. Brightwell.* 413

IV. Borough Fund, Application of.

1. The costs of defending quo warranto informations against an alderman of a borough, and of prosecuting a criminal information against a person for insulting a justice, are not payable out of the borough fund.
2. The town council may apply for a certiorari to remove an order of a previous council making an illegal application of the borough fund. *Reg. v. The Council of Bridgewater.* 558

Compensation to town clerks. See COMPENSATION, 2, 3—CORPORATION OFFICERS.

NECESSARIES.

See HUSBAND AND WIFE.

NEW RULES.

General issue by statute. See PLEADING, II.

NIL DEBET.

By statute. See PLEADING, II.

NON OBSTANTE VEREDICTO.

See LIMITATIONS.

NOTICE.

- I. Of dishonour. See BILLS OF EXCHANGE, 1.
- II. To quit. See COMPENSATION, 1.
- III. Of appeal. See SESSIONS, 1.
- IV. To produce. See EVIDENCE, VII.

V. Of Action.

By whom to be given.

1. Where a notice of action was required to be given by "the attorney or agent:"—Held, that a notice signed by "A. P., solicitor, as the prochein amy of the plaintiff," an infant, was sufficient. *De Goudin v. Lewis.* 283

When Defendant entitled to.

2. Where the plaintiff under a claim of right had taken forcible possession of premises and committed several outrageous acts, the attorney of the owner of the premises having been sent for *on the following day* gave the plaintiff, whom he found still on the premises, in charge, under the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30:—Held, that although not justified in so doing, he was entitled to notice of action.

To entitle a defendant to notice of action, under the Malicious Trespass Act, he must have acted both with *bona fides*, and also have had probable cause for believing that he was acting under the statute. *Cann v. Clipperton.* 560

3. Trustees of a paving and lighting act were authorized to abate any hogstye, necessary house, or nuisance in the parish, on complaint of any inhabitant:—Held, that, whether a brothel be a nuisance within the meaning of this provision or not, if the trustees took steps to put down such a house *bonâ*

fide, they were entitled to notice of action. *Norris v. Smith.* 353

Requisites of Notice.

4. Where trustees of a lighting and paving act were entitled to a certain number of days' notice of action, for any thing done in pursuance of the act, a notice that, unless the name of the party on whose information they had taken certain steps were given up, proceedings would be taken against them, was held bad, because it was conditional, and also by *Patteson J.*, because it should have specified that the action would be commenced at the expiration of the number of days mentioned in the act. *Ibid.*

NUSANCE.

Whether a brothel is a nuisance which the commissioners of a local act may abate. See NOTICE, V. 3.

OATH OF OFFICE.

Time for making declaration on election. See MUNICIPAL CORPORATION, I.

OFFICE FOR LIFE.

Amotion from. See COMPENSATION, 3.

OFFICER.

Liability of public officer. See CUSTOMS, II.

ORDER.

Of Poor Law Commissioners. See POOR LAW COMMISSIONERS, 1, 2.

Of removal. See POOR, II.

Of town council. See MUNICIPAL CORPORATIONS, IV. 2.

OVERSEERS.

Duty of, to account to Poor Law Commissioners. See POOR LAW COMMISSIONERS.

PARISH.

Right to appeal, when situated in two jurisdictions. See POOR, III.

PARLIAMENT.

1. Contract by Peer of Parliament, as to bill in parliament. See CONTRACT, 2.

Privilege of.

2. Where a plea to a declaration in libel justified under an order of the House of Commons, for the publication of parliamentary papers and reports, and an appointment of the defendants as printers and publishers, and averred that a report, containing the alleged libel, had been ordered by the House to be printed and published, and that the defendants, in pursuance of the order, published the report in question; and further alleged a resolution of the House of Commons, that the power of publishing such of its reports, votes and proceedings, as it should deem conducive to the public interests, was an essential incident to the functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it; the Court held, on demurrer, 1st. That it was competent to inquire whether the alleged privilege existed or not; 2dly, That no such privilege existed. *Stockdale v. Hansard.*

1

PAROCHIAL ASSESSMENT.

See POOR'S RATE.

PARTNERSHIP.

Parties to action. See JOINT STOCK COMPANY.

Effect of change of firm in guarantie. See GUARANTIE, 1.

PAVING AND LIGHTING.

Trustees of, notice of action to. See NOTICE, V. 3.

PAYMENT.

Plea of, to promissory note. See PLEADING, IV. 1.

Generally. See PLEADING, IV. 2.

Voluntary payment. See VOLUNTARY PAYMENT.

Of rates by burgess. See MUNICIPAL CORPORATION, II. 5.

PERSONAL ANSWER.

Distinction between, and responsive allegation. See PROHIBITION.

PETITIONING CREDITOR.

Bound by depositions of witnesses on petition. See EVIDENCE, VI.

PETTY BAG.

Fees of the clerk of, for producing records. See WITNESS, 2.

PETTY SESSIONS.

Jurisdiction to appoint high constable. See CONSTABLE.

PLEADING.**I. Generally.**

1. Description of Poor Law Commissioners. See POOR LAW COMMISSIONERS.

Venue.

2. Where the venue of the declaration was in Surrey, and the plea stated that the complaint was dismissed by justices of Surrey, it was held to appear sufficiently that the assault was committed in the same county, so as to give jurisdiction to such justices. *Skuse v. Davis*. 550

How Fraud must be pleaded.

3. A plea to a count by an indorsee against the drawer of a bill of exchange averred that the bill had been drawn and indorsed to L., for a specific purpose, who in fraud of that purpose had handed it to H.

and that H. handed it to the plaintiff, not for good and valuable consideration, and that the plaintiff was not a *bond fide* holder:—Held, that this allegation, connected with the rest of the plea, meant only that the plaintiff had not given good consideration for the bill, and that fraud in the plaintiff could not be given in evidence under it.

Semble, that if the allegation had stood alone, it would not have raised the issue as to fraud. *Uther v. Rich*. 579

II. General Issue by Statute.

1. Where to debt for goods sold and on an account stated the defendant pleaded *nil debet*, and on special demurrer suggested in argument that the general issue was given by the Highway Act (5 & 6 Will. 4, c. 50, s. 109) to the surveyor of highways in actions brought for anything done in pursuance of the act, and that the plaintiff had waived the tort and sued the defendant, or surveyor, for money had and received:—Held, that as the count on an account stated could not be brought within the statute, the plea was bad.
2. Where a statute gives the plea of the general issue for any thing done in pursuance of the act, the plaintiff cannot oust the defendant of this plea by waiving the tort and suing in contract. *Calvert v. Moggs*. 543
3. *Quære*, whether the defence, that there is no notice in writing of the contract under sect. 4 of the Statute of Frauds, need be pleaded specially. *Jones v. Flint*. 594

III. Confession and Avoidance.

To indebitatus assumpsit for money paid, a plea, that the money was paid by plaintiff, as defendant's agent, in the purchase of shares in a company, that, after the payment, the plaintiff received certificates of title to the shares, and ought to have delivered over the same to the

defendant. but that, instead thereof, converted the tickets to his own use, and thereby prevented the defendant from disposing of the shares, which were consequently of no use to the defendant, is bad on special demurrer, as it admits the plaintiff's right of action to be completed, and sets up, by way of confession and avoidance, that which is only a ground of cross action. *Francis v. Baker.* 569

IV. *Payment.*

1. *To Count on Promissory Note.*

To an action by indorsee against the maker of a promissory note, he pleaded that before the making of the note in the declaration mentioned, he made another note for the accommodation of the indorser, who indorsed it to the plaintiff, that when it became due, he (defendant) made the note in the declaration mentioned, and gave it to the indorser to take up such prior note. He then averred payment by the indorser to the plaintiff of the note in the declaration mentioned, and acceptance by the plaintiff:—Held, that the only material part of the plea was payment of the note declared upon, and that such payment might be proved without producing the note; and that all the averments as to the prior note were surplusage, which the defendant was not bound to give any evidence of. *Shearm v. Eurnard.* 565

2. *Of a smaller Sum in Accord and Satisfaction.*

A plea of payment of a smaller sum of money in bar of a claim for a larger sum, in indebitatus assumpsit, is not cured by verdict. *Down v. Hatcher.* 292

V. *Of Twenty Years' Use of Easement.* See LIMITATIONS.

VI. *Of Certificate under the Malicious Trespass Act.*

A plea to an action for an assault stated that the defendant had been summoned before two justices for the same assault, who thereupon dismissed the complaint upon the hearing, and did then, according to the 9 Geo. 4, c. 31, s. 27, make out a certificate of such dismissal:—Held, on special demurrer, that as the ground of the certificate did not appear, it could not be taken to have been given under such circumstances as to make it a bar to the action, and that the plea was bad. *Skuse v. Davis.* 550

VII. *Of the Plaintiff's Insolvency.*

To a plea alleging that the plaintiff had taken the benefit of the Insolvent Debtors' Act since the commencement of the action, a replication that the action is carried on for the benefit of his assignees is bad. *Swann v. Sutton.* 533

VIII. *In particular Cases.*

In ejectment. See ESTOPPEL, I.—MANDAMUS, II. 2.

Plea to count on lost promissory note. See BILLS OF EXCHANGE, 2.
Of sheriff's return of cepi corpus pleaded as estoppel. See ESTOPPEL, I. 2.

IX. *Frivolous Pleas.*

When Judgment may be signed.

1. In an action by indorsee of a bill of exchange against the acceptor, a plea that the drawer did not pay its amount to the acceptor as the consideration of the acceptance, was held frivolous, and the Court made absolute, with costs, a rule for signing judgment as for want of a plea. *Knowles v. Burward.* 235
2. To debt on bond, one of the defendants, who were under terms of pleading issuably, pleaded against the further maintenance of the ac-

tion, that at the commencement thereof he and the other defendant were in partnership in business for a term unexpired, and that in consideration that he, at the request of the plaintiff and the other defendant, would put an end to the partnership, the plaintiff promised to forbear further proceedings on the bond. Averment of performance by the defendant:—Held, that the plea was frivolous and not issuable; and the Court discharged with costs a rule, against which cause was shown in the first instance, for setting aside judgment which had been signed for want of a plea. *Blackburn v. Edwards and another.* 237

Where not.

To declaration in assumpsit, by the indorsee of a bill of exchange against the acceptor, the defendant, who was not under terms to plead issuably, pleaded that he had not notice of the indorsement to the plaintiff; that he did not at the time of the indorsement promise to pay the bill, and that the plaintiff did not at such time pay the full amount to his indorser. The Court refused a rule to sign judgment for want of plea. *Horner v. Keppel.* 234

POOR.

I. *Settlement of—Incorporeal Hereditament.*

The sessions held, that a cottage and garden for which the pauper paid 10*l.* per annum, including a right of ferry, and the use of the ferry-boat and line, conferred a settlement by renting a tenement. The cottage and garden alone were not worth 10*l.* per annum:—Held, that the right of ferry might be properly included in estimating the value of the cottage—and that, as the sessions had not found specifically that the rent for the ferry-boat and line would reduce the rent below 10*l.*, the settlement was

good. *Reg. v. Inhabitants of Fladbury.* 471

II. *Removal of.*

Pauper's Chargeability.

The copy of examinations on which an order of removal is made, and sent under s. 79 of 4 & 5 *Will. 4*, c. 76, should state that the pauper is chargeable to the removing parish, and if it omit to do so, the order is bad. *Reg. v. Inhabitants of Black Callerton.* 475

III. *Appeal against Removal.*

See SESSIONS, 1, 2.

By Parish, lying in two Jurisdictions.

1. The parish of B. contains the borough of B., which is not coextensive with the parish, and which before the Municipal Corporation Act had a quarter sessions with jurisdiction over the whole parish. The borough had not six justices, and therefore the parish had the power of appealing to the county sessions against a poor's rate under 1 *Geo. 4*, c. 36. The Municipal Corporation Act threw the outlying parts of the parish into the county jurisdiction:—Held, that sect. 111 did not take away the power of an inhabitant in the outlying parts of the parish to appeal against a poor's rate to the county sessions, and that the sessions might amend or quash the whole rate.
2. *Quære*, whether a parish, part of which is in a borough of exclusive jurisdiction, part in a county, and which had more than six justices at the time of passing the Municipal Corporation Act, has the power of appeal anywhere against a poor's rate. *Reg. v. The Inhabitants of Bridgewater.* 586

POOR'S RATE.

Stock in Trade.

1. Stock in trade, yielding profit, being rateable to the relief of the

poor, under 43 *Eliz.*, is not exempted by the (Parochial Assessment Act) 6 & 7 *Will.* 4, c. 96. *Reg. v. Lumsdaine.* 219

Union Workhouse.

2. Guardians of a union are rateable for a workhouse, erected under 4 & 5 *Will.* 4, c. 76, in one of the parishes of the union, to the poor-rate of the parish in which the house is situate. *Reg. v. The Guardians of the Wallingford Union.* 226

POOR LAW COMMISSIONERS.

Power over Overseers.

1. An indictment stated that the Poor Law Commissioners duly made an order that the auditor of a union should audit the accounts four times every year, viz. within thirty days of Lady-day, Midsummer, Michaelmas and Christmas days respectively; that a copy of this order, sealed &c., was duly sent to (among others) the defendants, overseers of a township in the union; that it was the duty of the defendants to account to the auditor when the commissioners should order; that the defendants were required by the auditor to account within thirty days of Christmas-day, and refused. Other counts charged the defendants with a breach of duty in not accounting to the auditor when requested by him:—Held, that the indictment was not sustainable under 4 & 5 *Will.* 4, c. 76, s. 47, as the first count did not allege that the commissioners had made any order that the defendants should account at the specified periods, and as the act does not oblige them to account at the request of the auditor, a breach of which alleged duty was the offence charged in the other counts.

The Poor Law Commissioners may be described in an indictment by their style of office.

The averment that their order was sent to the defendants is sufficient under the 18th section, personal service of the order not being necessary. *Reg. v. Crossley.* 319

Power over Collectors,

2. The commissioners for carrying into execution the 4 & 5 *Will.* 4, c. 76, have no power to direct the guardians of a union formed under the 26th section, and not being a union for the purpose of rating under the 34th section, to appoint a collector of the poor rates, either for the whole union or any component parish. *Reg. v. Poor Law Commissioners.* 323

PRACTICE.

At sessions. See *SESSIONS*.
 As to writs of mandamus. See *MANDAMUS*, III.
 Stay of proceedings in actions. See *MARSHAL*.
 Stay of proceedings in ejectment. See *EJECTMENT*, 2.
 Effect of detainers on party illegally arrested. See *ARREST*, 4.
 When a defendant may be retaken in execution. See *ARREST*, 3.

PRESCRIPTION.

See *LIMITATIONS*.

As to profit à prendre. See note on *Bailey v. Appleyard*, 3 N. & P. 257. p. i.

PRINCIPAL AND AGENT.

Implied authority of agent to act according to the particular rules of his business. See *BROKER*.
 Principal estopped from disputing act of agent, when. See *ESTOPPEL*, 5.
 Plea by principal to action by agent. See *PLEADING*, III.

PRISONER.

Warrant of attorney by. See *STAMP*, 2.
 When illegally arrested. See *ARREST*, 3, 4.

Effect of detainer on. See **ARREST**, 4.
Maintenance of in county gaol. See **GAOLS**.

PRIVILEGE.

See **PARLIAMENT**.

PROBABLE CAUSE.

See **NOTICE**, V. 2.

PROBATE.

What may be done before. See **DISTRESS**.

PROCHEIN AMY.

Notice of action by. See **NOTICE**, V. 1.

PROFIT A PRENDRE.

See note on *Bailey v. Appleyard*, p. i.
—**LIMITATIONS**.

PROHIBITION.

Where it lies.

The defendant, who was libelled in the Spiritual Court for non-payment of tithes by an impropriator, in his personal answer, set up a claim in a third person as lessee of the tithes, but made no mention of this claim in his responsive allegation:—Held, that as the lease had not been pleaded, but was set up in the personal answer only, which was no part of the proceedings to issue, this Court would not grant prohibition to the Court below, on the ground that it was proceeding to try a lease. *Lord Beauchamp v. Turner.* 496

PROMISSORY NOTE.

See **BILLS OF EXCHANGE**.

PUBLIC DOCUMENTS.

See **EVIDENCE**, VIII.

PUBLIC OFFICERS.

Actions maintainable against. See **CUSTOMS**, II. III.

PUIS DARREIN CONTINUANCE.

Plea of plaintiff's insolvency after action brought. See **PLEADING**, VII.

QUARTER SESSIONS.

See **SESSIONS**.

As to appointment of high constable. See **CONSTABLE**.

RAILWAY COMPANY.

1. Contract with landowner. See **CONTRACT**, 2.

Mandamus to Company to complete Railway.

2. The Court made absolute a rule for a mandamus to a Railway Company to proceed according to the terms of the act of parliament obtained by them, to set out and complete their line from A. to B., although they had executed part, and the time had not arrived within which they were to execute the remainder, and their funds were inadequate for the purpose; the Court being of opinion that they had no bona fide intention of completing the whole work. *Reg. v. The Eastern Counties Railway Company.* 648

3. Compensation clause. See **COMPENSATION**, 1.

RATE.

Borough rate. See **MUNICIPAL CORPORATION**, II. 5, IV.

Church rate. See **CHURCH RATE**.

County rate. See **GAOLS**.

Poor's rate. See **POOR'S RATE**.

RATIFICATION.

Of distress. See **DISTRESS**.

RATIONE TENURÆ.

Liability to repair sea walls. See **SEA WALLS**.

RE-ENTRY.

Clause of. See **EJECTMENT**, 2.

RELEASE.

Where unnecessary to be produced by witness. See EVIDENCE, X.

RENDER.

Of debtor under 1 & 2 Vict. c. 110. See IMPRISONMENT.

REPAIR.

Covenant to. See EJECTMENT, 2.
Of sea walls. See SEA WALLS.

REPUBLICATION.

Of will. See DEVISE.

REPUTATION.

Award not evidence of. See MANOR.

RESPONSIVE ALLEGATION.

Distinction between and personal answer. See PROHIBITION.

RETURN.

To fieri facias. See SHERIFF, 2.

REVOCATION.

Of will. See DEVISE.

ROLLS COURT.

Production of records of. See WITNESS, 2.

SALE AND RE-SALE.

See CONTRACT, 1.

SCIRE FACIAS.

When necessary.

1. *Quære*, Whether a party may be arrested on a ca. sa., which has been issued more than a year, and on which a previous sheriff has returned "non est inventus," without reviving the judgment by scire facias; *semble*, that, as the 3 & 4 Will. 4, c. 67, s. 2, enacts that the writ shall be returnable upon exe-

cution, and does not specify any limit, no scire facias is necessary. *Collins v. Yewens.* 439

Where nominal Plaintiff may be added.

2. The plaintiffs, who had been chosen assignees of a bankrupt, issued a scire facias to revive a judgment obtained by him before bankruptcy against the defendant, but omitted to make the official assignee a co-plaintiff. The Court, after plea pleaded and issue joined, allowed the proceedings to be amended by joining the official assignee, and held also, that in cases of such amendment the opposite party should always be allowed to plead de novo. *Holland v. Phillipps.* 336

SEA WALLS.

Liability to repair.

A liability may exist at law to repair sea walls *ratione tenuræ*, even though the damage may be occasioned by tempest, without any default in the obligor.

Semble, such liability is only limited by the ability of the party liable, or the value of the lands granted. *Reg. v. Leigh.* 357

SESSIONS (QUARTER).

County Sessions, Practice at.

1. The 4 & 5 Will. 4, c. 76, s. 81, makes no alteration in the time, fixed by the existing practice of sessions, for giving notice of appeal against orders of removal. *Reg. v. Inhabitants of Draughton.* 224
2. On the hearing of an appeal at sessions, the justices, including the chairman, were equally divided, whereupon the chairman gave his casting vote for the respondents. The appellants having objected to this course on the following day of the sessions, the question was argued by counsel on both sides, and the justices, not being entirely the same as those who voted on the

preceding day, determined to adhere to the previous decision. On a case reserved—Held, that though the decision of the first day was a nullity, it did not clearly appear that the subsequent decision was not on the merits, and therefore the Court refused to quash the order. *Reg. v. Inhabitants of Fladbury.* 471

3. Jurisdiction to appoint high constable. See CONSTABLE.

Borough Sessions, where exclusive Jurisdiction. See POOR, III. 2.

SEWERS.

Minutes of court of. See EVIDENCE, VIII.

Liability to repair sea walls. See SEA WALLS.

SHERIFF.

Warrant of. See LIBERTY.

Liability of Sheriff for Act of Officer.

1. In debt for a penalty against the sheriff for taking the plaintiff, who had been arrested by the defendant, to a public drinking house without the plaintiff's consent; the plea traversed the taking the plaintiff to the drinking house without his consent. Evidence was given at the trial that the same officer of the defendant who arrested the plaintiff also took him to the drinking house against his consent:—Held, that, as the plea admitted the officer who arrested was the defendant's agent, and the evidence shewed that the same officer took the plaintiff to the drinking house, it was not necessary to produce the warrant to make the defendant liable. *Barsham v. Bullock.* 241

Liability of, for False Return.

2. A right of action against the sheriff for a false return to a fieri facias, is not waived by accepting the sum levied on account and in

part satisfaction of the sum indorsed on the writ. *Holmes v. Clifton.* 556

For taking Insufficient Bail-Bond.

3. A declaration alleged that *Frederick S.*, who before his arrest was known as well by the name of *William* as of *Frederick*, whereof the defendant had notice, and who before the accruing of the debt oftentimes admitted to the plaintiff that he was known by the name of *William*, was arrested by the defendant, as sheriff, under a writ issued at the plaintiff's suit, and describing *S.* as *William S.*, and that the defendant took an insufficient bail-bond, and released him, whereby &c. The plea traversed that the defendant had notice that *S.* was as well known by the name of *William* as of *Frederick*, and alleged new matter with a verification. On demurrer to a subsequent part of the pleadings—Held, that as the plea denied that the defendant had notice as above, it was an answer to the cause of action in the declaration, for that the allegation as to *S.*'s admissions to the plaintiff was mere evidence, and that, as the sheriff would have been justified in letting the prisoner go at any time, he had not by taking a bail-bond rendered himself liable on the ground that he had exercised his election to treat the arrest as valid. *Brunskill v. Robertson.* 269

For not arresting.

4. Sheriff not liable for not arresting on a *ca. ad. resp.* within four months, unless special damage accrue. *Randell v. Wheble.* 602

STAMP.

1. On instrument not amounting to bill of exchange. See AGREEMENT.
- On Warrant of Attorney by Prisoner.
2. A warrant of attorney for a sum

above 50*l.* requires a 1*l.* 10*s.* stamp, although one of two parties giving it was in custody at the time of its execution, and if it has a 1*l.* stamp only, it cannot be enforced by judgment even against him singly, although it is a joint and several warrant. *Solari v. Yorston.* 338

STATUTES.

I. General.

29 *Car.* 2, c. 3, s. 4. Interest in land, (Frauds.) See FRAUDS, 3.

———— s. 17. Part acceptance. See CONTRACT, 1.

22 *Geo.* 2, c. 46. (Attornies.) See CLERK OF PEACE.

53 *Geo.* 3, c. 141. (Annuities.) See ANNUITY.

9 *Geo.* 4, c. 31. (Malicious Trespass Act.) See PLEADING, VI.

Notice under. See NOTICE, V. 2.

1 *Geo.* 4, c. 36. (Poor Law appeals.) See POOR, III.

11 *Geo.* 4 and 1 *Will.* 4, c. 60. (Copyholds.) See COPYHOLD.

11 *Geo.* 4 and 1 *Will.* 4, c. 64. (Beer Houses.) See CONVICTION.

11 *Geo.* 4 and 1 *Will.* 4, c. 70, s. 8. (Error.) *Nesbit v. Rishton.* 706

1 & 2 *Will.* 4, c. 58. (Interpleader Act.) See COSTS.

2 & 3 *Will.* 4, c. 71. (Limitations.) See LIMITATIONS.

3 & 4 *Will.* 4, c. 42, s. 23. (Amendment.) See AMENDMENT—SCIRE FACIAS.

3 & 4 *Will.* 4, c. 50, 52, 56. (Customs.) See CUSTOMS.

3 & 4 *Will.* 4, c. 98. (Usury.) See USURY.

4 & 5 *Will.* 4, c. 76, s. 47. (Auditors of unions.) See POOR LAW COMMISSIONERS.

———— s. 79. (Poor.) See POOR, II. 1.

4 & 5 *Will.* 4, c. 76, s. 81. (Poor.) See SESSIONS, 1.

4 & 5 *Will.* 4, c. 85. (Beer Houses.) See CONVICTION.

5 & 6 *Will.* 4, c. 76, s. 9. (Municipal Corporation.) See MUNICIPAL CORPORATION, II.

———— s. 66. See COMPENSATION.

———— s. 114. (Maintenance of borough prisoners.) See GAOL.

6 & 7 *Will.* 4, c. 96. (Parochial assessment.) See POOR'S RATE.

11 *Will.* 4 and 1 *Vict.* c. 78, s. 44. (Municipal corporation.) See CERTIORARI.

1 & 2 *Vict.* c. 110. (Imprisonment for debt.) See IMPRISONMENT.

II. Local.

4 & 5 *Will.* 4, c. lxxxviii. (London and Southampton Railway.) See COMPENSATION, 1.

STOCK BROKER.

See BROKER.

STOCK EXCHANGE.

Rules of. See BROKER.

STOCK IN TRADE.

See POOR'S RATE.

SUBPŒNA DUCES TECUM.

Fees of clerk of petty bag for producing records. See WITNESS, 2.

SURETY.

Interest on surety bond. See INTEREST, II.

To bond given by trader under 1 & 2 *Vict.* c. 110. See IMPRISONMENT.

SURPLUSAGE.

In pleading. See PLEADING, IV.

SURRENDER.

See COPYHOLD, 2.

TENDER.

Quære, whether a plea of a tender of part of the sum claimed in the declaration, there being only one contract proved, admits the contract. *Jones v. Flint.* 594

TENEMENT.

Occupation of. See MUNICIPAL CORPORATION, I.

TOWN CLERK.

Liability for practising at sessions. See CLERK OF THE PEACE.
Compensation to. See COMPENSATION, 2. 3.

TREASURER.

Order of county treasurer on borough, for expenses of county gaol. See GAOL.

TRESPASS DE BONIS ASPORTATIS.

See CUSTOMS, II.

TRUSTEES.

Public, notice of action to. See NOTICE, V. 3.
Action by nominal plaintiff. See PLEADING, VII.

UNION.

Union workhouse, rateability of. See POOR'S RATE.
Auditors of. See POOR LAW COMMISSIONERS.

USURY.

To an action against the acceptor of a bill of exchange, he pleaded that before &c. he was indebted to the plaintiff on an account stated, that it was corruptly agreed that defendant should pay part of the debt, and should have three months' forbearance, and accept a bill at that

date for payment of the residue, and should pay a sum (exceeding 5*l.* per cent.) for such forbearance, and that the stipulated sums were paid and the bill in question was given accordingly:—Held, that the transaction was exempted from the usury laws by 3 & 4 *Will.* 4, c. 98, s. 7. *King v. Braddon.* 546

VENUE.

See PLEADING, I. 2.

VERDICT.

What cured by. See PLEADING, IV. 2.
Where cause referred, time for giving certificate. See ARBITRATION, 6.
Evidence of reputation of manor boundary. See MANOR.

VESTRY.

Entitled to estimates previous to making church rate. See CHURCH RATE.

VOIRE DIRE.

See EVIDENCE, X.

VOLUNTARY PAYMENT.

When a creditor refused to sign a composition deed without a bill of exchange for the remainder of his debt, which the debtor gave him, and the former then signed the deed; the debtor having subsequently paid the amount of the bill to his creditor:—Held, that it was a voluntary payment, and could not be recovered back as money had and received. *Wilson v. Ray.* 253

WAIVER.

Of tort. See PLEADING, II. 2.
Of action against sheriff. See SHERIFF, 2.
Of term in written contract. See FRAUDS, 1.

WARRANT OF ATTORNEY.

See STAMP, 2.

WARRANT OF SHERIFF.See **LIBERTY.****WAY.**See **RAILWAY COMPANY.****WILL.**See **DEVISE.****WITNESS.**

1. Competency of interested witness.
See **EVIDENCE, X.**

Expenses of Clerk to Petty Bag.

2. A clerk of the Petty Bag Office of the Court of Chancery, who attends at the trial of a cause under a subpoena duces tecum to produce the rolls of the Court, is entitled to a reasonable fee for each day's attendance, for although he attends personally in pursuance of the subpoena, he produces the rolls of the Court solely under the order of the Master of the Rolls, who may annex a fee to the production of the rolls; and, if a party chooses to require the production of the rolls, he is bound to pay a reasonable fee imposed by the Master of the Rolls, and this, whether he is aware of the rules of the office requiring such fee or not.
3. The clerk of the Petty Bag Office, in whose custody the rolls of Chancery are, is entitled to recover for attendances in Court with the rolls, although he does not per-

sonally attend himself. *Bentall v. Sydney.* 416

Of Witnesses to explain ancient Documents.

4. Where a witness is called to translate and explain ancient documents, Rule 20, H. T. 4 Will. 4, does not apply, and his expenses are allowed, although notice to admit has not been given. *Bastard v. Smith.* 453

WRECK.What is. See **CUSTOMS, I.****WRIT OF ERROR.**

Pendency of, no answer to estoppel of judgment recovered. See **ESTOPPEL, I.**

From the Common Pleas, Lancaster.
Nesbit v. Riskton. 706

WRIT OF RIGHT.

Where the tenant demurred specially to a writ of right, and, on *nil dicit* by the demandant, entered up final judgment, viz. *consideratum est* that the demandant be in mercy, &c., and that the defendant hold the tenements assigned to him and his heirs quit of the said demandant and his heirs for ever; the Court of Queen's Bench reversed so much of the judgment on error from the Common Pleas, Lancaster, and the Court of Exchequer Chamber affirmed the decision of the Court of Queen's Bench. *Nesbit v. Riskton.* 706



